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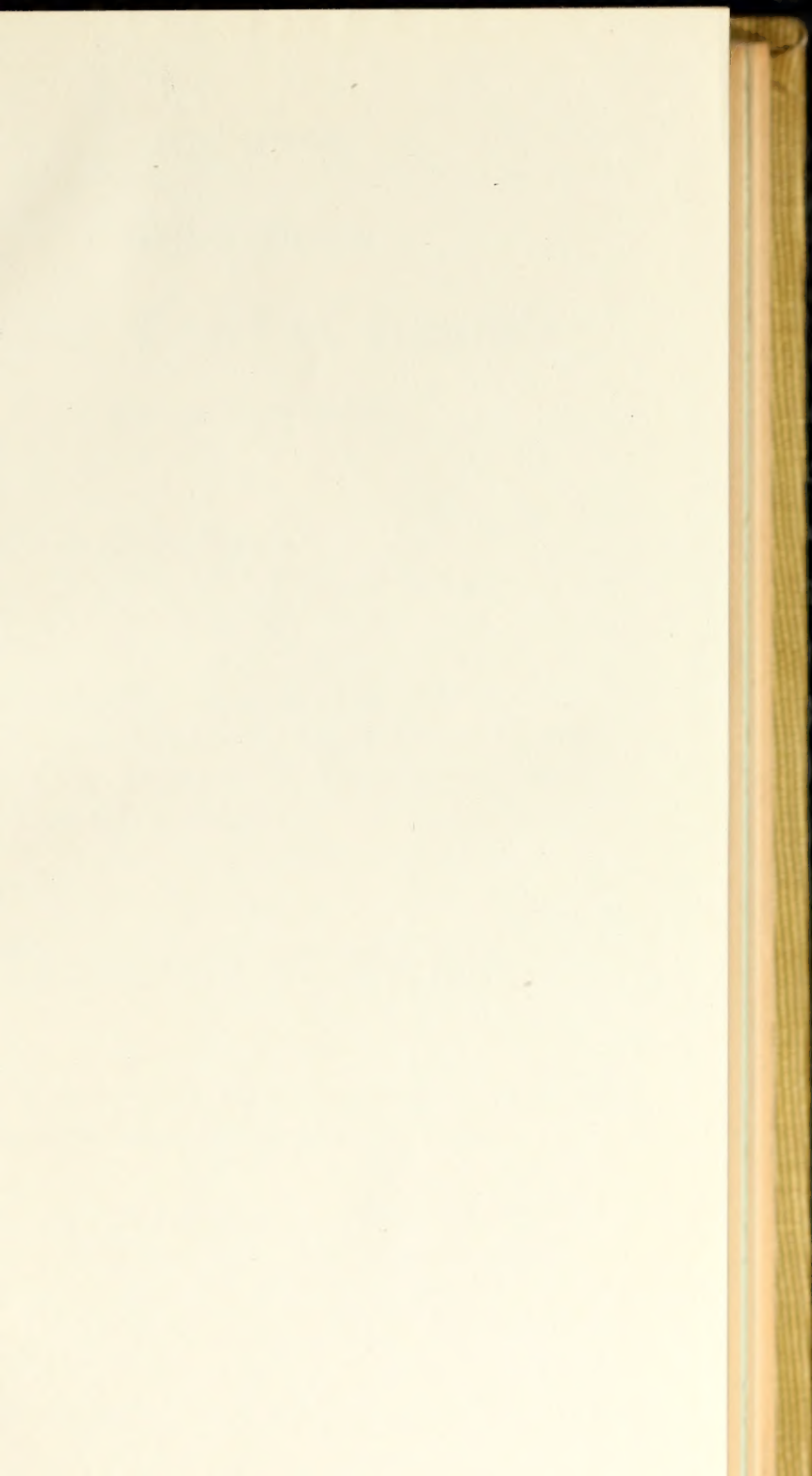
















United States  
District Court of Appeals  
For the Ninth Circuit.

CHARRENBURG,  
Plaintiff in Error,  
vs.

OLLAR STEAMSHIP COMPANY, DOL-  
LAR STEAMSHIP LINE, THE ROBERT  
OLLAR COMPANY, Corporations, and  
JAMES ABERNETHY,  
Defendants in Error.

Transcript of Record.

of Error to the United States District Court of the  
Northern District of California, First Division.

Filed

JUL 16 1915

F. D. Monckton,  
Clerk.





No. 2614

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United States

**District Court of Appeals**

**For the Ninth Circuit.**

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CHARRENBURG,  
Plaintiff in Error,  
vs.

DOLLAR STEAMSHIP COMPANY, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR COMPANY, Corporations, and JAMES ABERNETHY,  
Defendants in Error.

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**Transcript of Record.**

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of Error to the United States District Court of the Northern District of California, First Division.

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INDEX TO THE PRINTED TRANSCRIPT OF  
RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by placing in italic the two words between which the omission seems to have been made. Heads inserted by the Clerk are enclosed within

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murrer to the second amended complaint.

The order for judgment.

The judgment.

The assignment of errors.

H. W. HUTTON,

Attorney for Plaintiff in Error. [1a]

[Endorsed]: No. 2614. In the United States Circuit Court of Appeals for the Ninth Circuit. Paul Scharrenberg, Plaintiff in Error, vs. The Dollar Steamship Company et al., Defendants in Error. Designation of Parts of Record to be Printed. Copy received this 17th day of June, 1915. Nathan H. Frank, Attys. for Defendants in Error. Filed Jun. 29, 1915. F. D. Monckton, Clerk.

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*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

AT LAW—No. 15,520.

PAUL SCHARRENBERG,

Plaintiff,

vs.

THE DOLLAR STEAMSHIP COMPANY, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR COMPANY, Corporations, and JAMES ABERNETHY,

Defendants.

**Second Amended Complaint.**

Now comes the plaintiff above named, and by leave of the Court first had and obtained files this, his

second amended complaint herein, and complaining of defendants alleges:

I.

That as plaintiff is informed and believes and so avers, defendants, The Dollar Steamship Company, Dollar Steamship Line, and The Robert Dollar Company, on all of the dates and times herein mentioned, were and now are corporations.

II.

That on all of the dates and times herein mentioned, as plaintiff is informed and believes and so avers, the defendants The Dollar Steamship Company, Dollar Steamship Line and the Robert Dollar Company, were the operators of a certain steam merchant vessel flying the British flag, known as and called the "Bessie Dollar," and also of a certain American steam merchant vessel flying the American flag, named, known and called "Mackinaw," each of said vessels carrying merchandise, and being operated at the times herein mentioned, and the defendant James Abernethy was in the employ [2] of the defendant corporations herein as master of said vessel "Bessie Dollar."

III.

That as plaintiff is further informed and believes, and so avers the defendants herein at the times hereinafter mentioned, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person, named Dung Pau, into the United States of America, for the purpose of his performing labor in the said United States, he at all of the times herein mentioned being a Chinese



person, whose birth place and residence was and is the City of Shanghai, in China, as follows.

#### IV.

That on the 3d day of December, A. D. 1913, the said vessel "Bessie Dollar," was lying in the Port of Shanghai, in China, with a full complement of officers and a full crew on board, each of whom had signed shipping articles to serve in their respective capacities on said vessel on a voyage thence to other parts of the world and return, and at that time the defendants herein other than defendant James Abernethy, desiring to procure a Chinese person, alien and contract laborer to bring to the United States of America to perform labor for them therein, to wit, to serve as a seaman on board of the said vessel "Mackinaw," and with that intent, they caused the said James Abernethy to engage said contract laborer for that purpose, which he did, and to, and he did enter into a contract in writing with said contract laborer before a Consul of Great Britain at said Shanghai, which said contract was a contract designated and known as shipping articles, and in the instance herein mentioned, were additional and other shipping articles to the shipping articles already as hereinbefore mentioned signed by the officers and crew of the said vessel "Bessie Dollar," which said [3] additional shipping articles were signed by the said defendant Abernethy and the said contract laborer at the request of the other defendants herein, the said Abernethy and the said contract laborer both signing the same as aforesaid, and in said shipping articles the said contract laborer

agreed to go on board of the said vessel "Bessie Dollar" and work for defendants, and they agreed to employ him thereon and to bring him to the said United States so that he could work for the said defendants therein other than said defendant Abernethy, although at that time no seaman or other persons were needed to work upon the said "Bessie Dollar," the said shipping articles so signed by said Abernethy and the said contract laborer describing the latter's employment as follows; that is to say said contract laborer was to work as a purported seaman on said vessel "Bessie Dollar,"

"On voyages from Shanghai to San Francisco, there to join the S. S. 'Mackinaw,' or any other vessel, within the limits of 70 degrees north and 70 degrees south latitude, trading to and from as may be required, and back to Shanghai, to be discharged with consent of local authorities. Term of service not to exceed two (2) years. The master has the option to transfer any or all of the within mentioned persons to any other British or Foreign ship bound to Shanghai in the same capacity and at the same rate of wages."

That the real purpose of defendants other than the defendant Abernethy, was to employ said contract laborer within the United States of America, and that after the signing of said contract and on or about the 3d day of December, 1913, the said contract laborer went on board of said vessel "Bessie Dollar" at said Shanghai, and was by the defendants brought on said vessel to the Port of San Francisco, in the State of California, he working as a seaman

on said vessel on her passage from said Shanghai to said Port of San Francisco, at which last named place and on or about the 15th day of January, 1914, [4] at said last named place the defendants caused the said contract laborer to be discharged from said vessel, and he was by them discharged from service on her, and thereafter and upon the same day, the defendants herein other than defendant James Abernethy, in pursuance of the purpose for which they had brought the said contract laborer from said Shanghai, hired and employed him in the said Port of San Francisco, and caused him to sign a contract of shipment before the United States Shipping Commissioner for the said Port of San Francisco, on a voyage on said vessel described in said contract of shipment, as follows:

“From San Francisco, Cal., to Shanghai, China, and such other Asiatic Ports as the master may direct, via Grays Harbor, Seattle, Wash., and such other ports on the Pacific Coast as the master may direct; final port of discharge shall be Shanghai, China.”

That the Grays Harbor, and the Seattle mentioned in said contract of shipment are each ports, to wit, seaports in the State of Washington. That after the signing of such shipping articles or contract of shipment the said contract laborer went on board of said vessel “Mackinaw” in the employ of defendants other than said James Abernethy, at said Port of San Francisco, on or about the said 15th day of January, 1914, under and pursuant to his said hiring at said Shanghai, to work as a seaman on said vessel



“Mackinaw,” and worked on board of said vessel in the said Port of San Francisco, for some days, and also on a voyage of said vessel from said San Francisco, to said Grays Harbor and at said Grays Harbor also worked on said vessel as a seaman and pursuant to his said hiring, and did and is now so performing labor on board of said vessel.

That at all the times herein mentioned unemployed labor of a like kind to that performed, and for which the said contract laborer was so contracted with at said Shanghai to perform could have been found in the United States of America, and particularly in [5] those parts of the United States of America, where the said vessel from time to time was, and could have easily been found in the Port of San Francisco, in the State of California, on the 3d day of December, 1913, and for a long time prior thereto and at all times since.

That by reason of the foregoing plaintiff has been wronged and damaged, and the said defendants have become indebted to the plaintiff in the sum of one thousand (\$1,000.00) dollars, plaintiff having been wronged and damaged in that amount, none of which has been paid.

## SECOND COUNT.

For a further and second cause of action against said defendants plaintiff alleges:

a.

Plaintiff makes the whole of paragraphs numbered I, II and IV, of the first count of this complaint, a part of this second count, to serve in this

second count in the order in which they are numbered.

### VII.

That as plaintiff is further informed and believes, and so avers the defendants herein, at the times hereinafter mentioned, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Yuen Mow Shin, into the United States of America, for the purpose of his performing labor in the said United States of America, he at all of the times herein mentioned being a Chinese person, whose birth place and residence was and is the City of Shanghai, in China.

### THIRD COUNT.

For a further separate and third cause of action against said defendants, plaintiff alleges: [6]

#### a.

Plaintiff makes the whole of paragraphs numbered I, II and IV, of the first count of this complaint, a part of this third count, to serve in this third count in the order in which they are numbered.

### III.

That as plaintiff is informed and believes and so avers, the defendants herein at the times in paragraph IV hereof mentioned, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person, to wit, one Mau Shing Lang, into the United States of America, for the purpose of his performing labor in the said United States of America, he at all of the times herein mentioned being a Chinese person, whose

birth place and residence was and is the City of Shanghai, in China, as follows, to wit, as in *par*-person whose birth place and residence was the City of Shanghai, in China, said assistance and encouragement being in the manner set forth in paragraph IV, hereof, as follows, to wit:

#### FOURTH COUNT.

For a further separate and fourth cause of action against said defendants, plaintiff alleges:

a.

Plaintiff makes the whole of paragraphs I, II and IV, of the first count of this complaint a part of this fourth count, to serve as numbered in said first count.

#### III.

That as plaintiff is further informed and believes, and so avers, the defendants herein, at the times in paragraph IV hereof set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Sz Hang Lang, into the United States of America, for the purpose [7] of his performing labor in the said United States of America, he at said times being a Chinese person, whose birthplace and residence was the City of Shanghai, in China, said assistance and encouragement being in the manner set forth in paragraph IV, hereof as follows, to wit:

#### FIFTH COUNT.

For a further separate and fifth cause of action against said defendants, plaintiff alleges:

a.

Plaintiff makes the whole of paragraphs number



I, II and IV, of the first count of this complaint a part of this fifth count, to serve as numbered in said first count.

### III.

That as plaintiff is further informed and believes, and so avers, the defendants herein at the times in paragraph IV hereof set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Chin Pau Sue, into the United States of America, for the purpose of his performing labor in the said United States of America, he at said times being a Chinese person, whose birth place and residence was the City of Shanghai, in China, said assistance and encouragement being in the manner set forth in paragraph IV, hereof, as follows, to wit:

### SIXTH COUNT.

For a further separate and sixth cause of action against said defendants, plaintiff alleges:

#### a.

Plaintiff makes the whole of paragraphs number I, II and IV, of the first count of this complaint a part of this sixth count, to serve as numbered in said first count. [8]

### III.

That as plaintiff is further informed and believes, and so avers, the defendants herein, at the times in paragraph IV hereof set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Ying Wo Dong, into the United States of America,

for the purpose of his performing labor in the said United States of America, he at said times being a Chinese person, whose birth place and residence was the City of Shanghai, in China, said assistance and encouragement being in the manner set forth in paragraph IV, hereof, as follows, to wit:

### SEVENTH COUNT.

For a further separate and seventh cause of action against said defendants, plaintiff alleges:

a.

Plaintiff makes the whole of paragraphs number I, II and IV, of the first count of this complaint a part of this seventh count, to serve as numbered in said first count.

### III.

That as plaintiff is further informed and believes, and so avers, the defendants herein at the times in paragraph IV hereof set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Le Shin Knau into the United States of America, for the purpose of his performing labor in the said United States of America, he at said times being a Chinese person whose birth place and residence was the City of Shanghai, in China, said assistance and encouragement being in the manner set forth in paragraph IV hereof, as follows, to wit:

### EIGHTH COUNT.

For a further separate and eighth cause of action against said defendants, plaintiff alleges: [9]

a.

Plaintiff makes the whole of paragraphs I, II and IV, of the first count of the complaint a part of this eighth count, to serve as numbered in said first count.

## III.

That as plaintiff is further informed and believes and so avers, the defendants herein, at the times in paragraph IV hereof set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Yan Pam Fung, into the United States of America, for the purpose of his performing labor in the said United States of America, he at said times being a Chinese person, whose birth place and residence was the City of Shanghai, in China, said assistance and encouragement being in the manner set forth in paragraph IV, hereof as follows, to wit:

## NINTH COUNT.

For a further separate and ninth cause of action against said defendants, plaintiff alleges:

a.

Plaintiff makes the whole of paragraphs I, II and IV, of the first count of this complaint, a part of this ninth count, to serve as numbered in said first count.

## III.

That as plaintiff is further informed and believes and so avers, the defendants herein, at the times in paragraph IV hereof set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Chn Chang Kwa, into the United States of America, for the purpose of his performing labor in the said



United States of America, he at said times being a Chinese person, whose birth place and residence was the City of Shanghai, in China, said assistance and encouragement [10] being in the manner set forth in paragraph IV hereof, as follows, to wit:

#### TENTH COUNT.

For a further, separate and tenth cause of action against said defendants, plaintiff alleges:

a.

Plaintiff makes the whole of paragraphs I, II and IV, of the first count of this complaint, a part of this tenth count, to serve as they are numbered in said first count, in this tenth count.

#### III.

That as plaintiff is further informed and believes and so avers, the defendants herein, at the times in paragraph IV hereof set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Wong Chin Muk, into the United States of America, for the purpose of his performing labor in the said United States of America, he at said times being a Chinese person, whose birth place and residence was the City of Shanghai in China, said assistance and encouragement being in the manner set forth in paragraph IV hereof, as follows, to wit:

#### ELEVENTH COUNT.

For a further, separate and eleventh cause of action against said defendants, plaintiff alleges:

a.

Plaintiff makes the whole of paragraphs I, II and IV, of the first count of this complaint a part of this

eleventh count, to serve as they are numbered in said first count, in this eleventh count.

### III.

That as plaintiff is further informed and believes and so avers, the defendants herein at the times in paragraph IV, hereof [11] set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named San Sang Dong, into the United States of America, for the purpose of his performing labor in the said United States of America, he at said times being a Chinese person, whose birth place and residence was the City of Shanghai in China, as follows:

### TWELFTH COUNT.

For a further, separate and twelfth cause of action against said defendants, plaintiff alleges:

#### a.

Plaintiff makes the whole of paragraphs I, II and IV, of the first count of this complaint, a part of this twelfth count, to serve as they are numbered in said first count, in this count.

### III.

That as plaintiff is further informed and believes, and so avers, the defendants herein, at the times in paragraph IV hereof set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Ching Lung, into the United States of America, for the purpose of his performing labor in the said United States of America, he at said times being a Chinese person, whose birth place and residence was

the City of Shanghai in China, said assistance and encouragement being in the manner set forth in paragraph IV hereof as follows, to wit:

### THIRTEENTH COUNT.

For a further, separate and thirteenth cause of action against said defendants, plaintiff alleges.

a.

Plaintiff makes the whole of paragraphs I, II and IV, of the first cause of action of this complaint, a part of this thirteenth count to serve in the order in which they are numbered in said first count, in this count. [12]

### III.

That as plaintiff is further informed and believes and so avers, the defendants herein, at the times in paragraph IV hereof set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Ho Ah Chun into the United States of America, for the purpose of his performing labor in the said United States of America, he at said times being a Chinese person, whose birth place and residence was the City of Shanghai in China, as follows, to wit:

### FOURTEENTH COUNT.

For a further, separate and fourteenth cause of action against said defendants, plaintiff alleges:

a.

Plaintiff makes the whole of paragraphs I, II and IV, of the first count of this complaint, a part of this fourteenth count, to serve as they are numbered in said first count, in this count.



## III.

That as plaintiff is further informed and believes and so avers, the defendants herein, at the times herein in paragraph IV hereof set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Ye Pan Lo, into the United States of America, for the purpose of his performing labor in the said United States of America, he at said times being a Chinese person, whose birth place and residence was the City of Shanghai in China, said assistance and encouragement being in the manner set forth in paragraph IV hereof, as follows, to wit:

## FIFTEENTH COUNT.

For a further, separate and fifteenth cause of action against said defendants, plaintiff alleges: [13]

## a.

Plaintiff makes the whole of paragraphs I, II and IV, of the first count of this complaint a part of this fifteenth count, to serve as they are numbered in said first count, in this count.

## III.

That as plaintiff is further informed and believes and so avers, the defendants herein, at the times herein in paragraph IV hereof set forth knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person Tsang Po, into the United States of America, for the purpose of his performing labor in the said United States of America, he at said times being a Chinese person, whose birth place and residence was

the City of Shanghai in China, said assistance and encouragement being in the manner set forth in paragraph IV hereof, as follows, to wit:

### SIXTEENTH COUNT.

For a further, separate and sixteenth cause of action against said defendants, plaintiff alleges:

a.

Plaintiff makes the whole of paragraphs I, II and IV, of the first count of this complaint, a part of this sixteenth count, to serve as they are numbered in said first count, in this count.

### III.

That as plaintiff is further informed and believes and so avers, the defendants herein, at the times in paragraph IV hereof mentioned and set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Tsan Kang, into the United States of America, for the purpose of his performing labor in the said United States of America, he at said times being a Chinese person, whose birth place and residence was the City of Canton, in China, said assistance [14] and encouragement being in the manner set forth in paragraph IV hereof, as follows, to wit:

### SEVENTEENTH COUNT.

For a further, separate and seventeenth cause of action against said defendants, plaintiff alleges:

a.

Plaintiff makes the whole of paragraphs II and IV, of the first count of this complaint a part of this

seventeenth count, to serve as they are numbered in said first count, in this count.

### III.

That as plaintiff is further informed and believes and so avers, the defendants herein, at the times in paragraph IV hereof mentioned and set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Ching Ling, into the United States of America, for the purpose of his performing labor in the said United States of America, he at said times being a Chinese person, whose birth place and residence was the City of Canton in China, said assistance and encouragement being in the manner set forth in paragraph IV hereof, as follows, to wit:

### EIGHTEENTH COUNT.

For a further and separate and eighteenth cause of action against said defendants, plaintiff alleges:

#### a.

Plaintiff makes the whole of paragraphs I, II and IV, of the first count of this complaint, a part of this eighteenth count, to serve in the order in which they are numbered in said first count, in this count.

### III.

That as plaintiff is further informed *en* believes and so avers, the defendants herein, at the times in paragraph IV hereof mentioned [15] and set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Tsang On *Tsang On* into the United States of America, for the purpose of his performing labor in the said United States of



America, he at said times being a Chinese person, whose birth place and residence was the City of Canton in China, said assistance and encouragement being in the manner set forth in paragraph IV hereof, as follows, to wit:

### NINETEENTH COUNT.

For a further, separate and nineteenth cause of action against said defendants, plaintiff alleges:

a.

Plaintiff makes the whole of paragraphs I, II and IV, of the first count of this complaint, a part of this nineteenth count, to serve in the order in which they are numbered in said first count in this count.

### III.

That as plaintiff is further informed and believes and so avers, the defendants herein, at the times in paragraph IV hereof mentioned and set forth, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person named Wong Fook into the United States of America, for the purpose of his performing labor in the said United States of America, he at said times being a Chinese person whose birth place and residence was a certain city called Hongkong, in China, said assistance and encouragement being in the manner set forth in paragraph IV hereof as follows, to wit:

Wherefore, plaintiff prays judgment against said defendants for the sum of nineteen thousand (\$19,000.00) dollars and costs of this action.

H. W. HUTTON,  
Attorney for Plaintiff. [16]

United States of America,  
Northern District of California,—ss.

Paul Scharrenberg, being first duly sworn, deposes and says as follows:

I am the plaintiff above named, I have read the foregoing second amended complaint and I know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated on information or belief and as to those matters I believe it to be true.

PAUL SCHARRENBERG.

Subscribed and sworn to before me this 28th day of May, 1915.

[Seal]

L. H. ANDERSON,

Notary Public in and for the City and County of  
San Francisco, State of California.

Copy received this 28th day of May, 1914.

NATHAN H. FRANK,

Attorney for Defendants.

[Endorsed]: Filed May 29, 1914. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [17]

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*In the District Court of the United States, in and for  
the Northern District of California, Division  
One.*

AT LAW—No. 15,520.

PAUL SCHARRENBERG,

Plaintiff,

vs.

THE DOLLAR STEAMSHIP COMPANY et al.,  
Defendants.

**Demurrer to Second Amended Complaint.**

The defendants in the above-entitled cause file this, their Demurrer to the Second Amended Complaint on file herein, and for cause of demurrer allege as follows:

I.

That the first count in said second amended complaint set forth does not state facts sufficient to constitute a cause of action.

II.

That the second count in said second amended complaint set forth does not state facts sufficient to constitute a cause of action.

III.

That the third count in said second amended complaint set forth does not state facts sufficient to constitute a cause of action.

IV.

That the fourth count in said second amended complaint set forth does not state facts sufficient to constitute a cause of [18] action.

V.

That the fifth count in said second amended complaint set forth does not state facts sufficient to constitute a cause of action.

VI.

That the sixth count in said second amended complaint set forth does not state facts sufficient to constitute a cause of action.

VII.

That the seventh count in said second amended



complaint set forth does not state facts sufficient to constitute a cause of action.

VIII.

That the eighth count in said second amended complaint set forth does not state facts sufficient to constitute a cause of action.

IX.

That the ninth count in said second amended complaint set forth does not state facts sufficient to constitute a cause of action.

X.

That the tenth count in said second amended complaint set forth does not state facts sufficient to constitute a cause of action.

XI.

That the eleventh count in said second amended complaint set forth does not state facts sufficient to constitute a cause of action.

XII.

That the twelfth count in said second amended complaint set [19] forth does not state facts sufficient to constitute a cause of action.

XIII.

That the thirteenth count in said second amended complaint set forth does not state facts sufficient to constitute a cause of action.

XIV.

That the fourteenth count in said second amended complaint set forth does not state facts sufficient to constitute a cause of action.

XV.

That the fifteenth count in said second amended

complaint set forth does not *state sufficient* to constitute a cause of action.

XVI.

That the sixteenth count in said second amended complaint set forth does not state facts sufficient to constitute a cause of action.

XVII.

That the seventeenth count in said second amended complaint set forth does not state facts sufficient to constitute a cause of action.

XVIII.

That the nineteenth count in said second amended complaint set forth does not state facts sufficient to constitute a cause of action.

WHEREFORE, said defendants pray that said cause may be dismissed, and for their costs therein.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendants. [20]

We hereby certify that the foregoing Demurrer to Second Amended Complaint is in our opinion well taken in point of law, and that the same is not interposed for purposes of delay.

Dated, June 5th, 1914.

NATHAN H. FRANK,

IRVING H. FRANK,

Attorneys for Defendants.

Receipt of a copy of the within Demurrer to Second Amended Complaint is hereby admitted this 5th day of June, 1914.

H. W. HUTTON,

Attorney for Plaintiff.

[Endorsed]: Filed Jun. 8, 1914. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

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*In the District Court of the United States, in and for  
the Northern District of California, First Divi-  
sion.*

IN ADMIRALTY—No. 15,520.

PAUL SCHARRENBERG,

Plaintiff,

vs.

THE DOLLAR STEAMSHIP COMPANY et al.,  
Defendants.

**Order Sustaining Demurrer to 2d Amended  
Complaint.**

H. W. HUTTON, Esq., Attorney for Plaintiff.

NATHAN H. FRANK and IRVING H.

FRANK, Attorneys for Defendants.

The Second Amended Complaint does not present any state of facts differing in principle from those held to be insufficient to state a cause of action, when the demurrer to a prior Complaint was sustained.

The Demurrer to the Second Amended Complaint will, therefore, be sustained.

January 20th, 1915.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Jan. 20, 1915. W. B. Maling.  
Clerk. By Lyle S. Morris, Deputy Clerk. [22]



*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

AT LAW—No. 15,520.

PAUL SCHARRENBERG,

Plaintiff,

vs.

THE DOLLAR STEAMSHIP COMPANY et al.,  
Defendants.

**Request to Enter Judgment.**

To the Clerk of the Above-entitled Court.

No leave to amend having been given upon the sustaining of defendants demurrer to plaintiffs second amended complaint, and plaintiff desiring to have the order sustaining said demurrer reviewed by the Appellate Court, you will please enter up judgment for defendants.

Dated May 27th, 1915.

H. W. HUTTON,  
Attorney for Plaintiff.

[Endorsed]: Filed May 27, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [23]

*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 15,520.

PAUL SCHARRENBURG,

Plaintiff,

vs.

THE DOLLAR STEAMSHIP CO. and JAMES  
ABERNETHY,

Defendants.

**Judgment.**

In this cause, the Court having ordered that Defendants' Demurrer to the Second Amended Complaint be sustained, without leave to amend, and that Judgment be entered accordingly:

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action and that the defendants go hereof without day.

JUDGMENT ENTERED this 27th day of May,  
A. D. 1915.

W. B. MALING,  
Clerk.

By C. W. Calbreath,  
Deputy Clerk. [24]

*In the District Court of the United States in and for  
the Northern District of California, First Divi-  
sion.*

AT LAW.

PAUL SCHARRENBURG,

Plaintiff,

vs.

THE DOLLAR STEAMSHIP COMPANY et al.,  
Defendants.

**Assignment of Errors.**

I.

The Court erred in sustaining defendants demurrer to plaintiffs second amended complaint, for the reason that said complaint showed clearly that defendants at Shanghai in China, entered into a contract in writing with each of the persons named in said complaint, and each of whom were aliens, under and by which contract each of said aliens came to the United States, to perform services therein for said defendants, and that said defendants knowingly assisted and encouraged each of said aliens to come to the United States to *perform* labor therein under such contract of employment, and said defendants thereby encouraged and assisted in the importation of alien contract laborers into the United States.

Dated May 28th, 1915.

H. W. HUTTON,  
Attorney for Plaintiff.



[Endorsed]: Filed May 28, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [25]

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[Endorsed]: No. 2614. United States Circuit  
Court of Appeals for the Ninth Circuit. Paul  
Scharrenberg, Plaintiff in Error, vs. The Dollar  
Steamship Company, Dollar Steamship Line, The  
Robert Dollar Company, Corporations, and James  
Abernethy, Defendants in Error. Transcript of  
Record. Upon Writ of Error to the United States  
District Court of the Northern District of Califor-  
nia, First Division.

Filed June 17, 1915.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

No. 2614.

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

PAUL SCHARRENBERG,  
*Plaintiff and Plaintiff in Error,*  
vs.  
THE DOLLAR STEAMSHIP COMPANY,  
et al.,  
*Defendants and Defendants in Error.*

## BRIEF OF PLAINTIFF IN ERROR ON ORDER SUSTAINING GENERAL DEMURRER TO HIS COMPLAINT.

H. W. HUTTON,  
*Attorney for Plaintiff in Error.*

Filed this.....day of October, 1915.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

F. D. Monckton,



No. 2614.

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

PAUL SCHARRENBERG, <i>Plaintiff and Plaintiff in Error,</i> vs. THE DOLLAR STEAMSHIP COMPANY, et al., <i>Defendants and Defendants in Error.</i>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------

**BRIEF OF PLAINTIFF IN ERROR ON ORDER  
SUSTAINING GENERAL DEMURRER  
TO HIS COMPLAINT.**

**Statement of Facts.**

The complaint in this case states a cause of action, the facts pleaded are briefly as follows:

Defendants in error with the exception of James Abernethy, who was master of the British steamer "Bessie Dollar," were the owners and operators of that vessel and the American vessel "Mackinaw," the "Bessie Dollar" being in Shanghai, China, and the defendants other than Abernethy desiring to procure a Chinese crew to come to the United States for the Mackinaw, they caused to be shipped on the Bessie Dollar at Shanghai, an additional crew for



the Bessie Dollar, she having a complete crew on board without them and they made a shipping contract with the additional crew in part as follows: (Trans., page 5)

“On voyages from Shanghai to San Francisco, there to join the S. S. ‘Mackinaw,’ or any other vessel, within the limits of 70 degrees north and 70 degrees south latitude, trading to and from as may be required, and back to Shanghai, to be discharged with consent of the local authorities. Term of service not to exceed two (2) years. The master has the option to transfer any or all of the within mentioned persons to any other British or foreign ship bound to Shanghai in the same capacity and at the same rate of wages.”

The plain scope of the contract is for the aliens to leave a foreign country and come to San Francisco and work in that port, which is a part of the United States, and on an American vessel the “Mackinaw,” whose decks were always a part of the United States, no matter where she might be, and in the event that the “Mackinaw” did not go to Shanghai, the contract shows that the intention was to put them on a ship that did. The men were hired for a period not to exceed two years. In the meantime they could be held on the “Mackinaw” if they joined her and trade back and forth within the limits of 70 degrees north and 70 degrees south latitude until the two years expired.

The fact is the men complained of were brought to San Francisco, on the Bessie Dollar, paid off and discharged and then shipped on the "Mackinaw" under a contract describing their service as follows:

"From San Francisco, Cal., to Shanghai, China, and such other Asiatic ports as the master may direct, via Grays Harbor, Seattle, Wash., and such other ports on the Pacific Coast as the master may direct; final port of discharge shall be Shanghai, China."

Under the contract the men could be held for at least two years in coastwise trade.

The complaint alleges an intention to bring contract laborers to the United States, there to perform labor—and alleges that the men complained of did perform labor on the "Mackinaw" in San Francisco, and on a voyage thence to Grays Harbor and at Grays Harbor, and that the men complained of were still performing service on the vessel.

It is also alleged that the said men were aliens, natives of China, and that it was the desire of the defendants in error other than James Abernethy, to procure a Chinese person, alien and contract laborer to bring to the United States to perform labor for them therein, that caused them to secure and contract with the men complained of.

It is alleged that at the time in question the men were not needed to work the "Bessie Dollar" and

that labor of a like kind could have been procured in the United States for the "Mackinaw."

The original complaint was filed by Scharrenberg to recover nineteen penalties of one thousand (\$1000) dollars each, was amended to bring in new defendants, a general demurrer was sustained to the complaint as amended, no opinion being rendered by his Honor Judge Dooling on the order sustaining the demurrer, a second amended complaint was then filed, the complaint being amended only in the particulars of alleging that other labor of like kind could have been obtained in the United States at the times when, and at the places where the "Mackinaw" was.

A general demurrer was sustained to that complaint, no opinion was filed and no leave to amend given, and plaintiff sued out a writ of error.

## ARGUMENT.

### I.

#### **The Complaint States a Cause of Action for Penalties Under the Contract Labor Law.**

What is known as the Contract Labor law was first passed by Congress in 1885. 23 Stat. at Large, 332. The purpose of the law as has been stated by several courts, was to prevent those working in the United States from being *brought in competition*, with the pauper labor of other countries. *It is clear, however, that those following the sea as a call-*

*ing in the United States, were brought in competition in this instance.* The law seems to have fared very poorly, however, in the *nisi prius* courts, and we find many reversals for an attempt to abridge its terms. In the case of *United States vs. Parsons*, 66 C. C. A. 129, the lower Court held the law did not apply to farmers.

The learned Court of Appeals, Judges Lurton, Severens and Richards presiding, say on page 132:

“The statute under consideration was adopted for a wise purpose, and ought not to be whittled away, by a process of judicial construction. It contains specified exceptions and they ought not to be extended without good reasons.”

When the law was first passed, it seems to have been passed upon the theory that the laborer would come to this country, and no right of exclusion was contained within it. It was amended several times, and finally became a part of the Act known as:

“An Act to regulate the immigration of aliens into the United States.” The Act was last amended March 4th, 1913, but in so far as this case is concerned is found in 36 Stat. 263.

And the parts of the Act applicable to this case are as follows:

Sec. 2—

“That the following classes of aliens shall be excluded from admission into the United States.



All \* \* \* \* \* persons hereinafter called contract laborers who have been induced or solicited to migrate to this country by offers of employment or in consequence of agreements, oral, written or printed, expressed or implied, to perform labor in this country of any kind, skilled or unskilled, \* \* \* \* \*

That skilled labor may be imported if labor of like kind unemployed can not be found in this country: *and provided further*, that the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or person employed strictly as personal or domestic servants."

It will be seen that those working on vessels are not within the excepted classes.

Sec. 4 of the Act reads:

"That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this Act."

Sec. 5 reads:

"That for every violation of any of the provisions of section four of this Act the person, partnership, company, or corporation violating

the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

Sec. 7 reads:

"That no transportation company or owner or owners of vessels, or others engaged in transporting aliens into the United States, shall directly or indirectly, either by writing, printing, or oral representation, solicit, invite, or encourage the immigration of any aliens into the United States, but this shall not be held to prevent transportation companies from issuing letters, circulars, or advertisements, stating the sailings of their vessels and terms and facilities of transportation therein; and for a violation of this provision, any such transportation company, and any such owner or owners of vessels, and all others engaged in transporting aliens into the United States, and the agents by the employed, shall be severally subjected to the penalties imposed by section five of this Act."

It will thus be seen, that, *the prepayment of the transportation, the assisting, or, the encouraging of the migration or importation*, by any person whatever, or the soliciting, inviting or encouraging by a transportation company brings the several persons or companies within the provisions of the Act.

It is very clear that the defendants in this case first made a contract with the persons in question, and then both assisted and encouraged their migration to, and in fact brought them to this country on their vessel, the Bessie Dollar.

Sec. 33 of the Act reads:

“That for the purpose of this Act the term ‘United States’ as used in the title as well as in the various sections of this Act shall be construed to mean the United States and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone, *Provided*, That if any alien shall leave the canal zone and attempt to enter any other place under the jurisdiction of the United States, nothing contained in this Act shall be construed as permitting him to enter under any other conditions than those applicable to all aliens.”

The word “migrate” used in the Act applies to a temporary as much as to a permanent residence. It means the passing from one country to the

other, in Sec. 7 the word "immigration" is used showing that Congress intended that section to apply to cases of persons coming to this country at the request or upon the solicitation of a transportation company with the intention of staying.

In the case of *Grant Bros. vs. The United States*, 232 U. S. 647, a railroad was being constructed in Arizona, and the contractors sent person over the border to Mexico and hired labor to assist in building the road, suit was brought, judgment recovered and the United States Supreme Court sustained the judgment.

There is no question each of the men so hired would have gone back to Mexico; some did go back, but the judgment was sustained.

See also *U. S. vs. Regan*, 232 U. S. 37, reversing 203 Fed. Rep. 454.

In the case of *Taylor vs. U. S.*, 152 Fed 1, it was held that the Act in question applied to seamen. That case was subsequently reversed by the U. S. Supreme Court in 207, U. S. 125, but only on the point that the judgment set too high a standard of conduct for a master of a vessel in endeavoring to prevent a seaman from deserting. Sec. 18 of the Act was under consideration in that case, the section has since been amended to meet the objections stated in the above mentioned decision.



The United States Supreme Court, however, uses the following language on Page 126:

“A reason for the construction adopted below was found in the omission of the word ‘immigrant’ which had followed ‘alien’ in the earlier acts. No doubt that may have been intended to widen the reach of the statute, but we see no reason to suppose that the omission meant to do more than to avoid the suggestion that no one was within the act who did not come here with intent to remain.”

So temporary residents are now included in the law.

In *U. S. vs. Craig*, 28 Fed. Rep. 795, Judge Brown held that the Act applied to a ship carpenter.

## II.

### **The Men in Question Were in the United States When on Board of the “Mackinaw.”**

*Wilson vs. McNamee*, 102 U. S. 572, 574. :

“A vessel at sea is considered as a part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality; all on board are endowed and subject accordingly.”

*Crapo vs. Kelly*, 16 Wallace, 625.

In the case of the Chinese Waiter, 13 Fed. Rep., 286, his honor, Judge Field, held, that a Chinese person who was on an American vessel when the ex-

clusion act went into effect, was in the United States, and entitled to land upon her return, upon the theory that he had never left the United States.

In re Ah Tie, 13 Fed. Rep., 291.

In the case of In re Ross, 140 U. S. 453, the United States Supreme Court says, on page 472:

“The national character of the petitioner for all the purposes of the consular jurisdiction was determined by his enlistment as one of the crew of the Bullion. By such enlistment he becomes an American seaman—one of an American crew on board of an American vessel—and as such entitled to the protection and benefits of all the laws passed by congress on behalf of American seamen and subject to all their obligations and liabilities.”

Page 479:

“This rule that the vessel being American is evidence that the seamen on board are such, is now an established doctrine of this country, and in support of it there is with the American people no diversity of action.”

In the case of the *United States vs. Dwight Manufacturing Co.*, 210 Fed. 79-81 & 85, a demurrer to a much weaker complaint than the complaint in this case was overruled.

We have not the ideas of the lower court in sustaining the demurrer, but are confident the complaint states a cause of action.

The action is brought to recover penalties, and for no other purpose. But to show that actions like the defendants herein were guilty of, led to other and very serious consequences and for that reason the exceptions contained in the law cannot be extended in this case we now present the following:

### III.

#### **The Contract Laborers in This Case Were Chinese, Not Entitled to Enter the United States. Still Did Enter It.**

Each of them shipped for service on the "Mackinaw," before the United States Shipping Commissioner; being so shipped they each became American Seamen, and as is stated in *In re Ross*, 140 U. S. 453, above cited:

"and as such entitled to the benefit of all the laws passed by congress on behalf of American seamen."

They were thus entitled to the following privileges and benefits:

Under Section 4507, Revised Statutes, each was entitled to go to the United States Shipping Commissioner's Office to receive his pay in the event that he was transferred to another vessel.

Under Section 4526, Rev. Stat., each would be entitled to be returned to the United States at its expense in the event of the wreck of the "Mackinaw."

Under Section 4527 each would be entitled to libel the vessel and of course be present at the trial, if he was discharged before one month's pay was earned.

Under Section 4546 he would be entitled to go before a judge if his wages were not paid.

Under Section 4554 he would be entitled to go before a Shipping Commissioner, demand and have any question relating to him arbitrated.

Under Section 4561 he would be entitled to be discharged in the United States if the vessel was unseaworthy.

Under Section 4567 he would have the right to go ashore and make a complaint.

Under Section 4576 he would be entitled to be returned to the United States upon some discharges.

Under Section 4577 it would be the duty of the Consul to send him back to the United States at the expense of the United States if he became destitute in a foreign country.

Under 4581, he would have the right to be returned to the United States in any event.

In case of a sale of the vessel in a foreign country he would have the right to be returned under Section 4582.



In the event of sickness he would have the right to go to the United States Marine Hospital for treatment.

Many other sections could be cited tending to show that the men in question in this case acquired rights that virtually nullified the Exclusion Act.

See also Sections 4578, 4579, 4580, 4583.

It would be very easy for masters of foreign and other vessels to flood the country with Chinese seamen in violation of the exclusion act, if they are permitted to do as has been done in this case.

There is no question the men complained of were in the United States when on board of the "Mackinaw" at all times, and were particularly so when on board of her while she was lying at San Francisco, and Grays Harbor, and that they were contract laborers does not admit of any dispute, as aliens who are contracted with in a foreign port to come to the United States and join an American vessel in an American port, are certainly contract laborers.

Section 22 of the Act gives the Commissioner General of Immigration power to establish rules and regulations, etc., "not inconsistent with law." Such rules have been established, not only relating to seamen, but as to all other aliens. We have no doubt the rules will be cited by defendants in error, but they only apply to cases where a seaman happens

to be on board of a vessel, and his contract for some reason that could not be foreseen has ended, they cannot set aside the law, nor be applicable to case where there was a deliberate intent as in this case to violate the law.

We respectfully submit that the order sustaining the demurrer to plaintiff's complaint should be reversed.

Respectfully,

H. W. HUTTON,  
*Attorney for Plaintiff in Error.*



No. 2614

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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PAUL SCHARRENBURG,

*Plaintiff in Error,*

VS.

THE DOLLAR STEAMSHIP COMPANY, DOLLAR  
STEAMSHIP LINE, THE ROBERT DOLLAR  
COMPANY, Corporations, and JAMES  
ABERNETHY,

*Defendants in Error.*

## BRIEF FOR DEFENDANTS IN ERROR.

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NATHAN H. FRANK,

*Attorney for Defendants in Error.*

---

*Filed this.....day of November, 1915.*

FRANK D. MONCKTON, *Clerk.*

*By.....Deputy Clerk.*





No. 2614

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

PAUL SCHARRENBERG,

*Plaintiff in Error,*

VS.

THE DOLLAR STEAMSHIP COMPANY, DOLLAR  
STEAMSHIP LINE, THE ROBERT DOLLAR  
COMPANY, Corporations, and JAMES  
ABERNETHY,

*Defendants in Error.*

## BRIEF FOR DEFENDANTS IN ERROR.

### Statement of Facts.

The complaint in question alleges the incorporation of the defendants; that they were operators of a British merchant vessel known as the "Bessie Dollar", and also of an American merchant vessel known as the "Mackinaw"; and that the defendant Abernethy was the master of the "Bessie Dollar".

Then follow the allegations charging the liability, namely:

### "III.

"That as plaintiff is further informed and believes, and so avers, the defendants herein at the

times hereinafter mentioned, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person, named Dung Pau, into the United States of America, for the purpose of his performing labor in the said United States, he at all of the times herein mentioned being a Chinese person, whose birth place and residence was and is the City of Shanghai, in China, as follows:

#### “IV.

“That on the 3d day of December, A. D. 1913, the said vessel, ‘Bessie Dollar’, was lying in the port of Shanghai, in China, with a full complement of officers and a full crew on board, each of whom had signed shipping articles to serve in their respective capacities on said vessel on a voyage thence to other parts of the world and return, and at that time the defendants herein other than the defendant James Abernethy, desiring to procure a Chinese person, alien and contract laborer to bring to the United States of America to perform labor for them therein, to wit, to serve as a seaman on board of the said vessel ‘Mackinaw’, and with that intent they caused the said James Abernethy to engage said contract laborer for that purpose, which he did, and to, and he did enter into a contract in writing with said contract laborer before a Consul of Great Britain at said Shanghai, which said contract was a contract designated and known as shipping articles, and in the instance herein mentioned, were additional and other shipping articles to the shipping articles already as hereinbefore mentioned signed by the officers and crew of the said vessel ‘Bessie Dollar’, which said additional shipping articles were signed by the said defendant Abernethy and the said contract laborer at the request of the other defendants herein, the said Abernethy and the said contract laborer both signing the same as aforesaid, and in said shipping articles the said contract laborer agreed to go on board of the said vessel ‘Bessie Dollar’ and work for defendants, and

they agreed to employ him thereon and to bring him to the said United States so that he could work for the said defendants therein other than said defendant Abernethy, although at that time no seaman or other persons were needed to work upon the said 'Bessie Dollar', the said shipping articles so signed by said Abernethy and the said contract laborer describing the latter's employment as follows; that is to say said contract laborer was to work as a purported seaman on said vessel 'Bessie Dollar':

" 'On voyages from Shanghai to San Francisco, there to join the S. S. "Mackinaw" or any other vessel, within the limits of 70 degrees north and 70 degrees south latitude, trading to and from as may be required, and back to Shanghai, to be discharged with consent of local authorities. Term of service not to exceed two (2) years. The master has the option to transfer any and all of the within mentioned persons to any other British or foreign ship bound to Shanghai in the same capacity and at the same rate of wages.'

"That the real purpose of defendants other than the defendant Abernethy was to employ said contract laborer within the United States of America, and that after the signing of the said contract and on or about the 3d day of December, 1913, the said contract laborer went on board the said vessel 'Bessie Dollar' at said Shanghai, and was by the defendants brought on said vessel to the Port of San Francisco, in the State of California, he working as a seaman on said vessel on her passage from said Shanghai to said Port of San Francisco, at which last named place and on or about the 15th day of January, 1914, at said last named place, the defendants caused the said contract laborer to be discharged from said vessel, and he was by them discharged from service on her, and thereafter and upon the same day the defendants herein other than the defendant James Abernethy, in pursuance of the purpose for which they had brought the said con-



tract laborer from said Shanghai, hired and employed him in the said Port of San Francisco, and caused him to sign a contract of shipment before the United States Shipping Commissioner for the said Port of San Francisco, on a voyage on said vessel described in said contract of shipment as follows:

“ ‘From San Francisco, Cal., to Shanghai, China, and such other Asiatic ports as the master may direct, via Grays Harbor, Seattle, Wash., and such other ports on the Pacific coast as the master may direct; final port of discharge shall be Shanghai, China.’

“That the Grays Harbor and the Seattle mentioned in said contract of shipment are each ports, to wit, seaports in the State of Washington. That after the signing of such shipping articles or contract of shipment the said contract laborer went on board the said vessel ‘Mackinaw’ in the employ of defendants other than said James Abernethy, at said Port of San Francisco, on or about the said 15th day of January, 1914, under and pursuant to his said hiring at said Shanghai, to work as a seaman on said vessel ‘Mackinaw’, and worked on board of said vessel in the said Port of San Francisco, for some days, and also on a voyage of said vessel from said San Francisco to said Grays Harbor and at said Grays Harbor also worked on said vessel as a seaman and pursuant to his said hiring, and did and is now so performing labor on board of said vessel.

“That at all the times herein mentioned, unemployed labor of a like kind to that performed, and for which the said contract laborer was so contracted with at said Shanghai to perform could have been found in the United States of America, and particularly in those parts of the United States of America where the said vessel from time to time was, and could have easily been found in the Port of San Francisco, in the State of California, on the 3d day

of December, 1913, and for a long time prior thereto, and at all times since.

“That by reason of the foregoing plaintiff has been wronged and damaged, and the said defendants have become indebted to the plaintiff in the sum of one thousand (\$1,000.00) dollars, plaintiff having been wronged and damaged in that amount, none of which has been paid.”

The other eighteen counts are of the same tenor, each simply referring to Paragraphs I, II, and IV of the first count, and re-stating Paragraph III, except for the change in the name of the Chinese alleged to have been imported.

To each of said counts a demurrer was interposed upon the ground that it failed to state a cause of action.

This appeal is from the order sustaining said demurrer.

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### Argument.

The statute upon which the complaint is founded is the Immigration Act of February 20, 1907 (34 Stat. 898) as amended by the Acts of March 26, 1910 (36 Stat. 263).

Section 4 of the Act provides:

“That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or *migration* of any contract laborer or contract laborers *into* the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in Section 2 of this Act.”

Section 5 provides:

“That for every violation of any of the provisions of Section 4 of this Act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the *migration* or importation of any contract laborer *into* the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, \* \* \* as debts of like amount are now recovered in the Courts of the United States”; etc.

The provisos referred to in Section 4 are as follows:

“That skilled labor may be imported if labor of like kind unemployed cannot be found in this country: AND PROVIDED FURTHER, that the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants.”

Section 22 provides:

“That the commissioner general of immigration \* \* \* shall under the direction of the Secretary of Labor \* \* \* establish such rules and regulations \* \* \* and shall issue from time to time such instructions, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this Act and for *protecting the United States* and aliens migrating thereto from fraud and loss”; etc.

Under the authority thus conferred, the Department of Labor promulgated, among others, the following rules:

Rule 1, subd. 3—"The head tax shall not be levied on."

\* \* \* \* \*

"(j) Bona fide seamen who land in the United States pursuant to their calling."

"Rule 10, SEAMEN—Subdivision 1. Who are seamen.—(a) A seaman is any person employed to serve on board a vessel, whose employment is necessary to commerce and navigation and whose name appears on the ship's articles."

\* \* \* \* \*

"(c) Seamen *whose employment terminates at a port of the United States and seamen who are discharged in a port of the United States* are to be treated as seamen *if it appears that they intend to re-ship on a vessel bound to a foreign port, or to depart from the country within a reasonable time.*"

"(d) Alien seamen, however, who are insane, idiots, imbecile, epileptics, or person afflicted with tuberculosis or with a loathsome, dangerous, contagious disease, and the existence of whose disease or disability might have been detected by means of a competent medical examination at the time of foreign embarkation, are persons whose employment on board vessels is in nowise necessary to commerce and navigation, and who are, accordingly, *not within the exception in favor of seamen, because not within the reason thereof.* The bringing of such seamen to the United States, therefore, is unlawful by the terms of Section 9."

\* \* \* \* \*

"Subd. 3. Seamen engaged in foreign trade.—Subject to the foregoing limitations and restrictions, *alien seamen* employed on vessels plying between foreign ports and ports of the United States *may, without regard to the provisions of the immigration*



*law, land in the United States either on shore leave or on business of the vessel, or for any purpose incident to their calling, including for the purpose of re-shipping on another vessel bound to a foreign port as soon as practicable."*

The italics in the above quotations are our own.

It will be observed that the above rules permit the discharge of alien seamen in the United States if they intend to re-ship, and generally permit them to land "*on shore leave or on business of the vessel, or for any purpose incident to their calling*".

Neither do the rules limit the "re-shipping" to a re-shipment on another *foreign vessel*, but only to "a vessel bound to a foreign port". It may, therefore, be an American vessel.

The rules and regulations express in very plain terms the interpretation placed by the Department upon this law and establish the executive practice with respect to its enforcement. It seems to have been recognized both by the courts and by the executive department that seamen, while engaged in their calling, are not, within the meaning of the law, contract laborers, and that having in view the necessities of commerce, the statute never intended to include them while engaged in the business of their calling.

The rules thus enacted are justified by the controlling decisions upon the subject.

In *Taylor v. United States*, 207 U. S. 124-126, the Supreme Court, in considering the question as to whether or no the bringing of a sailor to the United

States was "bringing an alien to the United States", or permitting a sailor to land was permitting an "alien to land", within the meaning of the Act, said:

"We assume for purposes of decision that one who makes it possible for an alien to land, by omitting due precautions to prevent it, permits him to land within the meaning of the penal clause in Section 18. But we are of opinion that the section does not apply to the ordinary case of a sailor deserting while on shore leave, and that therefore the judgment must be reversed. We are led to this opinion by what seems to us the literal meaning of the section and *also by the construction that would be almost necessary if the literal meaning seemed to be less plain.*

"The reasoning is not long. The phrase which qualifies the whole section is, 'bringing an alien to the United States'. It is only 'such' officers of 'such' vessels that are punished. 'Bringing to the United States', taken literally and nicely, means, as a similar phrase in Section 8 plainly means, transporting with intent to leave in the United States and for the sake of transport,—not transporting with intent to carry back, and merely as incident to employment on the instrument of transport. So again, literally, the later words 'to land' mean to go ashore. To avoid certain inconveniences the government and the courts below say that sailors do not land unless they permanently leave the ship. But the single word is used for all cases and must mean the same thing for all, for sailors and other aliens. It hardly can be supposed that a master would be held justified under this section for allowing a leper to wander through the streets of New York on the ground that, as he expected the passenger to return and his expectations had been fulfilled, he could not be said to have allowed the leper to land. The words must be taken in their literal sense. 'Landing from such vessel' takes place and is complete the moment the vessel is left and the shore

reached. *But it is necessary to commerce*, as all admit, that sailors should go ashore, and no one believes that the statute intended altogether to prohibit their doing so. *The contrary always has been understood of the earlier Acts, in judicial decisions and executive practice.* If we reject the ambiguous interpretation of 'to land', as we have, the necessary result can be reached only by saying that *the section does not apply to sailors carried to an American port with a bona fide intent to take them out again when the ship goes on*, when not only there was no ground for supposing that they were making the voyage a pretext to get here, desert, and get in, but there is no evidence that they were doing so in fact. Whether this result is reached by the interpretation of the words 'bringing an alien to the United States', that has been suggested, or on the ground that the statute cannot have intended its precautions to apply to the ordinary and necessary landing of seamen, even if the words of the section embrace it, as in *Church of the Holy Trinity v. United States*, 143 United States 457, 36 L. Ed. 226, 12 Sup. Ct. Rep. 511, does not matter for this case. We think it superfluous to go through all the sections of the Act for confirmation of our opinion. It is enough to say that we feel no doubt when we read the Act as a whole."

In *United States v. Sandrey*, 48 Fed. 552-53, Judge Pardee, of Louisiana, gives expression to the following views concerning the interpretation of this law. It was a case where a stowaway had been signed as a seaman and afterwards deserted. The master was charged with a violation of the Act, and the Court said:

"Aliens composing the crews of vessels visiting our seaports are in no sense immigrants, and as the review of the statute as above shows, are nowise affected by the law in question. With regard to them,

the law imposes no duties, nor penalties upon the masters and agents of vessels.

\* \* \* \* \*

“Prior to his shipment he was a stowaway and destitute, and his purpose may have been to immigrate to the United States, but when he was enrolled as a seaman and signed articles from a voyage from Liverpool to New Orleans and return to Liverpool, his status as a British seaman became fixed. He ceased, for the time being, at least, to be a possible immigrant; and with regard to him the master of the steamship Cuban, the accused in this cause, was charged with no duties, nor exposed to any penalties under the Act of Congress approved March 3, 1891. His desertion after the arrival of the ship at the port of New Orleans in no wise affects the duty or the responsibility of the accused. Murray’s legal *status*, if he is now in this country, is not that of an immigrant, but that of a deserter from his ship.”

The provisions of the Act are set forth in the decision, from which it can readily be seen that the above language applied to that act, is equally applicable to the Act at present under consideration.

So, in the case of *United States v. Burke*, 99 Fed. R. 896-97-98, the question is treated with considerable fullness, and the fact that the opinion of the Court contains some of the arguments we would address to the Court in the case at bar, is our excuse for a somewhat lengthy quotation:

“The legislation contained in the various statutes that have been passed relating to immigration is clearly directed against the immigration into this country of certain classes of persons who come in with the intent to enter into and become a part of the mass of its citizenship or population. Immigra-



tion is defined to be the entering into a country with the intention of residing in it. The earlier statutes merely prohibit contract laborers being brought in. The later ones prohibit the bringing in of immigrants—persons who come into this country with the intention of remaining, of fixing a residence here—and who are calculated to become a charge upon the country, or who are unfit, on account of moral character, previous conviction of crime, or disease, to be admitted as citizens. Nothing in the scope of the statutes seems to contemplate, or can be rationally held to contemplate, the prohibition of the bringing within the country by vessels of their crews engaged under contracts made out of the country, to labor on the vessels while approaching and while in the ports of this country, and to sail again with the vessels from this country. By Sections 1, 2 and 3 of the Act of February 26, 1885 (1 Supp. Rev. St. U. S., p. 479), it is provided that it is illegal for any person to in any way assist or encourage the *migration* of any alien or foreigner *into* the United States under previous contract with said alien or foreigner to perform labor or service of any kind in the United States, its territories, or the District of Columbia. Such contracts are avoided, and a penalty of \$1,000 is imposed for every such offense as to each alien or foreigner. Thus it is made illegal to assist or encourage the *migration* of any alien *into* the United States under previous contract with him to perform labor in the United States; that is to say, it is illegal to assist or encourage any alien to remove or change his residence into the United States under previous contract with him to perform labor in the United States. Now, every foreign seaman on a vessel of this or a foreign country, signed on the articles aboard, is an alien contracted with to perform duty in the United States while the vessel lies in the United States, loading; but he is not contracted with to remove to the United States, or assisted or encouraged to migrate—to change his resi-

dence—to the United States, to perform labor there. It is to be assumed that Congress uses language employed by it in its enactments in its ordinary meaning and acceptance. The particular statute invoked on behalf of the respondent, being that of March 3, 1891, clearly relates to immigration, and is leveled only against immigrants—that is, those who are coming to the United States to make it a home—for in the first section it is declared that certain classes of aliens shall be excluded from admission into the United States ‘in accordance with the existing Acts regulating immigration’. The third section excludes the encouragement of immigration to this country of aliens by promise of employment, advertisement, and the like. The fourth makes it unlawful for steamships or transportation companies or vessel owners, by writing or otherwise, to solicit or encourage immigration of aliens into the United States, other than by stating the sailings of their vessels and their facilities. The sixth section forbids the bringing into the United States of any aliens not lawfully entitled to enter, and punishes the offense; and the eighth section provides that upon the arrival by water of alien immigrants at any port it shall be the duty of the master to report the name, nationality, etc., of the alien to the proper officers, and provides for an inspection of these persons before they can be lawfully landed. The tenth section then declares that all aliens who may unlawfully come into the United States shall be sent back on the vessel by which they were brought in at the cost of the master or owner, and, if the said master shall refuse to receive back such aliens as he unlawfully brought to the United States and as were sent back to the vessel or shall refuse or neglect to return them to the port from which they came, he shall be punished in a fine of not less than \$300, and shall not have clearance of his ship until it is paid. Here we see a definite purpose to exclude the immigration, and the bringing of persons intending to immigrate, into the United States,

if they belong to the excluded classes, with definite specific provisions for their deportation by the medium through which they entered the country. If this law applied to the crews of ships generally, by Section 6 of this Act, as well as by the section of the previous Act cited in the earlier part of this opinion, *no vessel, foreign or domestic, could lawfully enter the ports of the United States with an alien seaman on board.* I cannot so interpret the law. If it be said that the mere bringing into the United States of these alien seamen may not be an offense, but that landing them would be, notwithstanding the law forbids in the disjunctive—the bringing into ‘or’ landing—then we have presented by this contention the duty, as one imposed by Congress, that the masters of all ships, American or otherwise, shall either imprison, put under hatches, put in irons, or guard every alien seaman in their crews during their entire stay in port, however protracted by the exigencies to commerce and the ship’s loading, lest one of these aliens should set foot at some time on shore for recreation or health, or for supplying his limited needs in the shops of the country. This cannot be the just interpretation of the laws of Congress upon the subject of immigration, and such interpretation is not justified by the terms of those statutes, upon a general survey of them in all their parts. These immigration statutes are to be construed as a whole, and not by singling out particular words or sections, and interpreting them according to their strict letter. A thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. ‘All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.’ *Holy Trinity Church v. United States*, 143 U. S. 461, 12 Sup. Ct. 512, 36 L. Ed. 228. ‘Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the

legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.’ *Lau Ow Baw v. United States*, 144 U. S. 59, 12 Sup. Ct. 520, 36 L. Ed. 344. A consideration of the whole legislation on the subject of alien immigration, of the circumstances surrounding its enactment, and of the unjust results which would follow from giving such meaning to it as is here claimed for it, makes it unreasonable to believe that Congress intended to include a case like the present one. My opinion is that these statutes do not contemplate the exclusion of the crews of vessels which lawfully trade to our ports, and that they do not, in spirit or in letter, apply to seamen engaged in their calling, whose home is the sea; who are here today and gone tomorrow; who come on a vessel into the United States with no purpose to reside therein, but with the intention, when they come, of leaving again, on that or some other vessel, for the port of shipment or some other foreign port in the course of their trade. To hold that these statutes apply to aliens comprising the bona fide crews of vessels engaged in commerce between the United States and foreign countries would lead to great injustice to such vessels, oppression to their crews, and serious consequences to commerce.”

The foregoing decision is very much along the same line as that rendered by this Court in the case of *Moffatt v. United States*, 128 Fed. 375-78, in which appear extracts from the foregoing opinions, clearly indicating the approval and adoption by this Court of the principles therein stated. The case of *Holy Trinity Church*, 143 U. S. 457, referred to by this Court as one of the best reasoned cases to be found upon the subject, is a case where the Supreme Court was called upon to construe the Act of February 26, 1885, to prohibit the im-



migration of foreigners or aliens *under contract or agreement to perform labor in the United States*.

It will thus be seen that both the executive and the judicial departments of the government are agreed that seamen are neither within the reason, nor the purpose, of the statute.

But it is suggested that since the above decisions the Act has been so amended as to cover "temporary residence", and that this was effected by an amendment calculated to meet the objections stated in *Taylor v. United States*. The amendment is the omission of the word "immigrant", which followed the word "alien" in the earlier Acts; that is, Section 2, which now reads:

"That the following classes of aliens shall be excluded from admission to the United States",  
etc.,

formerly read:

"That the following classes of 'alien immigrants' shall be excluded from admission into the United States."

This, however, in nowise changes the purpose of the Act, or otherwise affects the question now under consideration. The Act as it now stands is entitled:

"An Act to Regulate the Immigration of Aliens into the United States",

while the part of Section 2, referring to contract laborers, describes the persons excluded as

"Persons hereinafter called contract laborers who have been induced or solicited to *migrate* to this country by offers or promise of employment."



Sections 4 and 5, which declare such acts to be a misdemeanor and provide the penalty, describe the prohibited act as the "encouraging or assisting the importation or *migration* of any contract laborer *into* the United States".

In that connection the language of the Act is unchanged.

To "immigrate" and to "migrate to" or "migrate into" are different modes of expressing the same idea. To "*immigrate*" is to "migrate to", or "into", while to "emigrate" is to "migrate from". So far, therefore, as the question of "contract laborers" is concerned, there is no change in the meaning of the statute.

Neither do we regard the language of the Supreme Court in *Taylor v. United States* as attempting to decide the question, but rather to leave it open.

Nevertheless, whatever conclusion we may arrive at regarding the effect of the language in that case upon the application of the Act to "temporary residents" *it does not affect the main issue in the cause*, which was directly decided in *Taylor v. United States*, namely, the direct holding "that the section does not apply to sailors carried into an American port with a bona fide intent to take them out again when the ship goes on". In other words, whether the Act applies to temporary residents or to permanent residents, it does *not* apply to seamen, and until the Supreme Court shall overrule

the case of *Taylor v. United States* we must conclude that that is the law.

It would seem that we need go no further in the discussion of this question.

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## II.

However, it is urged:

1. That an American vessel is American territory, and hence that the men in question were in the United States when on board the "Mackinaw".

2. That they performed labor on board the vessel *in American ports*.

3. That in going from San Francisco to Grays Harbor they were engaged in coastwise trade.

None of these questions, however, will answer the purpose to avoid the effect of the foregoing decisions.

These men were not engaged in "coastwise trade", because there is no allegation to the effect that *cargo* was being transported between American ports. The mere touching of a vessel at American ports without the transportation and discharge of cargo between those ports is not "coastwise trade". Their contract on the "Mackinaw" is for a voyage "*From San Francisco, Cal., to Shanghai, China, and such other Asiatic ports as the master may direct, via Grays Harbor, Seattle*", etc.

So far as being employed in laboring on board the vessel *in American ports* is concerned, that is directly covered by the foregoing decisions.

AMERICAN SHIP, AMERICAN TERRITORY.—The suggestion that an American vessel is considered as American territory seems rather to strengthen the argument of the courts based upon the “necessities of commerce” than to aid the appellant.

As was said in the case of *Holy Trinity Church v. United States*, and practically in the same language by this Court in *Moffatt v. United States*,

“All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.”

Some of these consequences are pointed out in the case of *United States v. Burke*, *ante*, but the suggestion that a contract for service by an alien on board of an American ship is a violation of the law because an American ship is American territory, leads to additional unjust and absurd consequences which it could not have been the intention of Congress to promote, and which by the enactment of the rules hereinbefore quoted, it is the plain and evident intention of the executive department to obviate.

Assuming that an American vessel is “American territory”, and that the Act prohibits a contract with an alien for the performance of labor upon American territory, we have the result that *an American vessel abroad*, requiring a crew, in whole or in part, *cannot hire any seamen*. When short of a crew in a foreign port, she must either *go out of commission* or “lie by” until “like labor” to be “found in this country” can be transported to the ship—a very effectual means of destroy-

ing all American commerce. Surely Congress did not mean to do this, yet, if we concede plaintiff's contention that seamen are to be included under the term "contract labor" as used in the Act, such is the necessary result of a consistent application of that construction.

So, too, it is suggested that an American ship shipping "aliens" brings the "aliens" within the rule laid down *In re Ross*,

"By such enlistment he becomes an *American seaman*—one of an American crew on board an American vessel—and as such entitled to the protection and benefits of all the laws passed by Congress in behalf of seamen and subject to all their obligations and liabilities."

Appellant then cites various statutes which render it necessary to permit such "alien contract laborers", because of their thusly acquired character of "American seamen", to be permitted to land on shore. But what of it? That is no greater right than the courts accord to all seamen, whether American or foreign. These landings are in pursuance of their calling as seamen, and are not inconsistent with their re-shipment to a foreign port, when the purpose of their landing is fulfilled. For instance: An American seaman is entitled to go to the United States Commissioner's office to *receive his pay* in the event that he was *transferred to another vessel*. But under the rule laid down by *Taylor v. United States*, if he were an alien seaman on board a *foreign vessel*, he would be entitled to do the same.

"But it is necessary to commerce, as all admit, that sailors should go ashore, and no one believes that the statute intended altogether to prohibit their

doing so. The contrary always has been understood of the earlier Acts, in judicial decisions and executive practice" (207 U. S. 125).

So, too, with his right to be present at a trial for his wages, or his discharge in the United States if the vessel be unseaworthy, or his right to go ashore to make a complaint. So, too, with his return to the United States in the event of the wreck of the "Mackinaw", or the duty of the Consul to send him back to the United States if he becomes destitute in a foreign country. Always his contract with the "Mackinaw" is that his final port of discharge shall be Shanghai, China. Hence his return to the United States would be only one step toward his return to Shanghai.

Again: What will we say of the intent of Congress with regard to the landing of alien seamen brought here under contract for service, whether on American or foreign vessels, in view of the recent Act of Congress known as the "Seaman's Act"? Does that show an intention on the part of Congress that alien seamen shall not be landed on American soil? Sections 16 and 17 of the Act of March 4, 1915, provide for the abrogation of all laws which "relate to the arrest or imprisonment of seamen *deserting*, or charged with deserting from merchant vessels of *foreign nations in the United States and Territories and possessions thereof*". Does not that provision of the Act indicate the intention of Congress that alien seamen shall be permitted to land upon the territory of the United States? Is it not in effect an Act intended to promote or facilitate the de-



section of alien seamen at American ports, and thus recognizing their right to land? Does it not by its very terms recognize the alien seaman as an exception to the law respecting contract labor?

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### III.

One further observation upon this litigation:

If the rules of the Department are legal, that is, not inconsistent with law, there can be no question of the right of the defendants to do what they have been alleged in this complaint to have done. It is only by declaring those rules void that any hope of recovery can be had in this cause, for the rules, as they stand, have the force of law.

It is said that this is a civil action of debt, and as such is subject to the rules of law applicable to a civil action.

“Such an action is to be conducted and determined *according to the same rules and with the same incidents* as are other civil actions.” *United States v. Regan*, 232 U. S. 46-47; *Grant Bros. v. United States*, 232 U. S. 647.”

This action is brought by a *private person for his own benefit*, as, under the law, he is permitted to do. The action, therefore, is an ordinary civil action by one private person against another to recover a debt. The plaintiff's right of recovery, however, depends not only upon the statute, but is further subject to the acts of the government relating to or affecting the cause of action. For instance: If the penalty had been incurred and

the government had thereafter remitted the same, then the plaintiff could not recover. So, also, if the defendant had paid the fine to the government, that act of the government would discharge defendant, and the plaintiff could not recover.

In the present case, the government has enacted rules which, by exempting seamen from the provisions of the Act, has invited and induced the defendant to commit the acts complained of.

The plaintiff must accept the conditions which the government, whether rightly or wrongly, has been pleased to impose. He cannot disavow the act of the government. *Whatever the government has done in the premises, plaintiff has done*, and the question arises, Is not the plaintiff estopped from claiming the penalty? The inequity and injustice of an attempt to penalize the defendants, in the face of such explicit invitation on the part of the government to do the acts complained of, is only too apparent, and nothing but a superior policy of the law could make such injustice successful. Does such policy exist in favor of the plaintiff?

In this connection it must not be lost sight of that, if the government had desired to enforce this penalty, it could have done so by bringing an action. Not having begun such an action is evidence that the government does not approve of the position taken by the plaintiff. And since the plaintiff has, for his own private ends and purposes, and for his own benefit, commenced the action, it is but fair that he should not be permitted to succeed in such an unjust cause unless the Court is

absolutely compelled, by inflexible rules of law whose application cannot be questioned, to permit it.

By this suggestion we do not wish to be understood as admitting the invalidity of the Department rules.

Our main contention is that they are "not inconsistent with law" but are consistent with and an attempt to enforce the law, as the same has been interpreted by the Supreme Court in the cases of the *Holy Trinity Church* and *Taylor v. United States*, as well as other cases hereinbefore referred to.

We respectfully suggest that the judgment should be affirmed.

Dated, San Francisco,

November 1, 1915.

Respectfully submitted,

NATHAN H. FRANK,

*Attorney for Defendants in Error.*

No. 2614

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

PAUL SCHARRENBURG,

*Plaintiff in Error,*

vs.

THE DOLLAR STEAMSHIP COMPANY,  
et al.,

*Defendants in Error.*

## PETITION FOR A REHEARING

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H. W. HUTTON,  
*Attorney for Plaintiff in Error.*

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Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

Filed  
MAR 15 1916  
F. D. MONCKTON





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# United States Circuit Court of Appeals

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PAUL SCHARRENBURG,  
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VS.

THE DOLLAR STEAMSHIP COMPANY,  
et al.,  
*Defendants in Error.*

## PETITION FOR A REHEARING

To the Honorable the above-entitled Court, and to the Judges thereof, Paul Scharrenberg, the plaintiff in error, respectfully petitions for a reconsideration of the above cause, and for reasons why the same should be granted, presents the following:

The case is one of great national importance, as it not only affects ships, but also sailors. The merchant marine has hitherto made experienced sailors; there is and has been no other school; from them develop all of the masters and other officers of vessels, without the opportunity of men first serving as seamen on merchant vessels. There will be no opportunity of obtaining officers for them. The men in this case were shipped to work on

coasting voyages in part, and under the decision of this Court herein, there will be nothing to prevent any shipowner from bringing Chinese to this country, and manning every vessel in the coasting trade with them. This Court has held that a vessel so manned is unseaworthy; the result of such importations will result in giving us a merchant marine of unseaworthy ships. Again to the merchant marine we have always looked in the past for sailors to man our warships. The hardships hitherto suffered by sailors on American merchant vessels, greater than those of any other nation, has produced the condition that our war vessels are about one-third manned, as we have no American sailors, in the event of war they would be one-third manned. It is possible that the glamor of war might induce some few to enlist, but it is doubtful if our navy would ever be made more than half manned, even with that stimulus to enlistment. If all our merchant ships can be manned with Chinese, where are we to get our sailors and officers for vessels?

Why again should seamen as a class be brought into direct competition with Asiatics when no other class are? *Congress has not in the statutes said they should be*, and why should the exceptions in the statute be extended against them when they are extended against no other class?

The rule of statutory construction in the case of exceptions is clear and well understood. The U. S. Supreme Court has defined what it is. We quote from *Kendall vs. United States*, 107 U. S. 123:

“125. And that there might be no misapprehension as to the intention of Congress, the statute, after enumerating the cases to which the limitation of six years shall not apply, declares that ‘no other disability than those enumerated shall prevent any claim from being disbarred.’ *The court cannot superadd to those enumerated, a disability arising from the claimant’s inability to truthfully take the required oath. It has no more authority to engraft that disability upon the statute than a disability arising from sickness, surprise, or inevitable accident, which might prevent a claimant from suing within the time prescribed.*”

The language in this statute is general, with exceptions, the rule under such a statute is clearly stated in *Lewis Sutherland Statutory Construction*, 2 Ed., Sec. 494:

“An express exception, exemption or saving excludes others. Where a general rule has been established by statute with exceptions the court will not curtail the former nor add to the latter by implication. \* \* \* \* \* The expression of one thing is the exclusion of another; and consequently no further exception was intended.”

And also in *Wabash R. R. Co. vs. United States*, 101 C. C. A. 133:

“But the power was conferred and the duty was imposed upon the members of Congress, and not upon the courts, to determine whether or not these exceptions to the express terms of the proviso should be made. They did not make them, *and that fact raises a conclusive presumption that they did not intend to make them, and it is not in the province of the courts to do so.* \* \* \* \* \* (many cases cited.)

The case of the Holy Trinity Church does not lend any sanction whatever to the extension of exceptions. The Court elaborately and with its usual learning *ascertained the meaning of the language of the statute itself* by analyzing the language, and the intent of Congress from its debates, and determined that a minister of the gospel did *not perform labor or service within the meaning of the terms* labor and service, and that Congress so understood their meaning, as is hereafter shown.

The language of Section 33 is general, there are no exceptions in that section, which exclusively shows that Congress never intended there should be any. We take the liberty of quoting further from the case of the *Chinese Waiter*, 13 Fed. 289.

In that case, to show that a Chinese person was always within the United States, when serving as a seaman on an American vessel, and to show that he was not therefore subject to the terms of the exclusion Act, it is properly stated:

“And in this connection it should not be overlooked that the petitioner while on board the steamship as one of its crew *was within the jurisdiction of the United States, at all times* under the protection and amenable to their laws. An American vessel is deemed to be a part of the territory of the United States, *the rights of its crew are measured by the laws of the state or nation*, and their contracts are enforceable by its tribunals.”

The above language is general, and certainly applies as much to the converse of the facts in that case as it does to the facts as they were therein.

Judge Field never intended that language to be applied to a case of where a Chinese was endeavoring to establish his right to stay within the United States, *and it not to apply* where the same rule of law was invoked for the purpose of endeavoring to keep him out.

## I.

### Is a Sailor's Home on the Sea?

If a sailor's home was on the sea, it would seem that that would be an additional reason for affording him the protection that all others are entitled to, for as a whole they are not able to be here and watch the passage of the statutes.

But his home is no more on the sea than is the home of internes in hospitals, employees in a hotel, or any other person who happens to sleep where he earns his living.

The ship he sails on has a *home port*, is required by law to have one, and the very worst that can be said against the sailor is that his home is the same home that the vessel that he temporarily sails on has, but even that will not suffice under the ordinary construction of language. The law requires, Sec. 4511 Revised Statutes, that Shipping Articles shall contain:

"2. The number and *description of the crew*, specifying their respective employments."

The description of a man is who he is and where he belongs, and shipping articles always contain such information. The very fact that the provisions



of the Shipping laws provide for the paying off of a sailor show that *his home* is not on the vessel, but simply a place of temporary occupation.

*Home*, is defined in an *Immigration law case* to be:

*Ex parte Petterson*, 166 Fed. 545.

“The domicile of a person, in a strict legal sense, is where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. Story on Conflicting Laws, 8th Ed., Sec. 41. It has been said that no one word in the English language is more nearly synonymous with the word ‘domicile’ than our word ‘home.’ (Cases cited.)

In that case a woman who came to this country and lived in a place of prostitution, was held not to have acquired a home because she could not have intended to permanently stay there. No sailor that ever lived ever intended to permanently stay on any one vessel, or on the sea. Many vote, many are married, they almost all have places of abode on land, they all in common with all of us have a place of birth on land, and in the absence of any other home that would be his home. But if a sailor’s home was on the sea, what difference should it make? He is as much entitled to protection against unjust competition as any other class; *so are ship-owners, who cannot bring in Asiatic labor.*

A man’s home is his habitual abode, not the place that he temporarily goes to to enable him to earn a living.

## II.

## There Is No Room for the Extension of the Exceptions in This Case.

Let us now consider the law, its history, and the previous decisions of the courts upon it.

The law as first enacted read, Act of February 26, 1885:

“That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien, or aliens, and foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parole or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to *perform labor or service of any kind* in the United States, its Territories, or the District of Columbia.

It was that law the U. S. Supreme Court had under consideration in the Holy Trinity Church case. Let us see what it said and did. 143 U. S. 457:

“462. Among other things which may be considered in determining the intent of the legislature is the title of the act. \* \* \* \* 463. Now, the title of this act is, ‘An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to *perform labor* in the United States, its Territories and the District of Columbia. Obviously, the thought expressed in this *reaches only to the work of the manual laborer as distinguished*

*from that of the professional man. No one reading such a title would suppose Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain. The common understanding of the term labor and laborers does not include preaching and preachers; and it is to assume that words and phrases are used in their ordinary meaning. So whatever light is thrown upon the statute by the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers and pastors."*

There is no room for questioning the soundness of that reasoning, nor is there of the language of the Act itself.

Labor has been correctly defined in the above language, and service usually means persons at service.

The decision was rendered February 29th, 1892. March 3rd, 1891, Congress amended the Act of 1885. (The hiring of Warren in the Trinity Church case, took place September, 1887) and Congress added the following:

"Sec. 5. That section five of said act of February twenty-sixth, eighteen hundred and eighty-five, shall be, and hereby is, amended by adding to the second provision in said section the words '*nor to ministers of any religious denomination, nor persons belonging to any recognized profession, nor professors for colleges and seminaries,*' and by excluding from the second of said section the words '*or any relative or personal friend.*' "

It will be seen that Congress amended the section after the Circuit Court held that the ministers were within the law (36 Fed. Rep. 303), to wit: while it was pending in the U. S. Supreme Court it was amended in the particulars above mentioned to show *that it had not intended to include ministers of the gospel at any time.*

The title of the Act of March 3, 1891, read:

“An Act in amendment to the various acts relative to immigrants and the importation of aliens under contract or agreement to perform labor.”

Subsequent to that Congress again passed a law known as the Act of March 3, 1893. The title to that Act read:

“An Act to facilitate the enforcement of the immigration and *contract-labor* laws of the United States.”

There was very little in that law about the contract labor law, but in 1903 Congress again passed a law into which it incorporated all of the immigration laws, including the contract labor law.

Section 4 of that Act read:

“Sec. 4. That it shall be unlawful for any person, company, partnership or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any *alien* into the United States, in pursuance of any offer, solicitation, promise, or agreement, parole or special, express or implied, made previous to

the importation of such *alien* to perform labor or service of any kind, *skilled or unskilled*, in the United States."

Section 2 of that Act read in part:

"That skilled labor may be imported, if labor of like kind unemployed cannot be found in this country. And provided further, that the provisions of this law applicable to contract labor shall not be held to include *professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants.*"

The next Act and the one in question in this case was passed February 20, 1907. Its title was "An Act to regulate the immigration of aliens into the United States."

That Act seems similar to the other laws, excepting only that the word alien seems to be generally omitted in the body of the Act.

The particular significance of that law, however, as applicable to this case, is the fact that after all of the foregoing amendments, Congress inserted a section which reads:

"Sec. 4. That it shall be a misdemeanor for any person, company, partnership or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, *unless such contract laborer or*



*contract laborers are exempted under the terms of the last two provisions contained in section two of this act."*

It is very clear from the language that Congress knew what it intended, and fully understood what exceptions it wanted. It specified the exceptions, it specified the classes of persons that it did not intend the Act to cover, *and sailors are not included in the exception, and vessels are not excluded from the provisions of Section 33 of the Act.*

The exceptions are:

*"That skilled labor may be imported if labor of like kind unemployed cannot be found in this country. And provided further, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants."*

As to contract labor, sailors are not within the excluded list, and the principle of law, *expressio unius est exclusio alterius*, unquestionably applies, if Congress had intended to include sailors, as not within the contract labor law, in the light of the various amendments to the law, which, of course, were had after years of elaborate discussion, *it would undoubtedly have said so.*

"Sec. 33. That for the purposes of the Act the term 'United States' as used in the title, as well as *the various sections* of this Act shall be

construed to mean the United States and any waters, territory, *or other place subject to the jurisdiction thereof,*" \* \* \*

We find no mention there of any exclusion of vessels from the operation of the contract labor part of the Act.

It is very clear that the case of the Holy Trinity Church cannot be used to excuse the contract and transportation in this case, for the reason that the law has been frequently amended and all the Supreme Court did was to decide that the Act as it was then in question, prohibited the importation of those under contract to perform *labor or service*, and it was very properly held that a minister of the gospel did neither.

The Act now reads, "To *perform labor* in this country of any kind, *skilled or unskilled.*" And it is very clear, that the men in question in this case did perform labor of one of those kinds.

Another proof of the purposes of the Act showing that the above-mentioned case cannot be used to extend the exceptions in this case, is found on page 464 of 143 U. S.:

"A singular circumstance, throwing light upon the intent of Congress, is found in this extract from the report of the Senate Committee on Education and Labor, recommending the passage of the bill. \* \* \* \* \*

The committee, however, believing that the bill in its present form will be construed *as including only those whose labor or service is*

*manual in character*, and being desirous that the bill become a law before the adjournment, have reported the bill without change."

That language shows clearly the correctness of the ruling of the U. S. Supreme Court, and just as clearly that the case cannot be applied to this, these men were performing manual labor.

### III.

#### **The Purposes of the Act.**

The above-mentioned case is the best source of information as to the purposes of the Act.

143 U. S. 463:

"The motives and history of the Act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer, upon the one hand agreed to prepay their passage, while upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the Act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage."

The defendants in error in this case had an agent, to wit: a shipmaster in China; very few shipowners

have. They were able in that way to secure a crew for the "Mackinaw" at about one-fifth of the wages that other shipowners had to pay. The sailors on the Pacific Coast were brought into direct competition with such wages; other shipowners could not compete. This Court held in the case of *In re Pacific Mail S. S. Co.*, 130 Fed. 176, that a vessel manned as the "Mackinaw" was with these men was unseaworthy. Congress has given its support to the opinion of this Court in that case, *by now requiring a language test*, in common with many other natures. It is too clear for argument that not only the letter, but the spirit of the Act was violated in this case, and if such acts are persisted in, they will undoubtedly lead to the wholesale importation of Asiatics and manning of all American vessels with Chinese, or some similar Asiatic race, with the final result that we will have unseaworthy vessels, and seamen who make their home in this country will be brought down to the level of the Asiatics, who took their place in this instance.

#### IV.

#### **The Authorities Cited in the Opinion of the Court Have No Application to This Case.**

We respectfully call the Court's attention to the fact that there is a wide distinction between the case of a vessel lying in an American port with a *bona fide crew on board*, where one of them escapes against proper precautions taken by the master, and a case where a vessel lying in a foreign port with a

*bona fide* crew on board, and another crew is then shipped for the express purpose of bringing it to this country and transshipping it to an American vessel. The latter crew cannot be *bona fide*, it was not needed on the "Bessie Dollar," she had one *bona fide* crew, she could not have two. When the U. S. Supreme Court used the word *bona fide*, it meant just what it said, and it meant to go no further; that is clearly shown by its own language.

*U. S. vs. Taylor*, 207 U. S. 120, page 127:

"Of course it is possible for a master unlawfully to permit an alien to land, *even if the alien is a sailor.*"

That language shows that the Supreme Court never intended that case to apply to the whole range of sailor and shipping cases. *But landing is not involved in this case; in that case it was.*

In the Taylor case, the law that it was claimed was violated, read:

"Sec. 18. That it shall be the duty of the owners, officers and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time or place *other than that designated by the immigration officers*, and any such owner, officer, agent, or person in charge of such vessel who shall land or permit to land any alien at any time or place other than that designated by the immigration officers, shall be deemed guilty of a misdemeanor, and shall on conviction be punished by a fine for each alien so permitted to land of not less than one hundred nor more than one



thousand dollars, or by imprisonment for term not exceeding one year, or by both such fine and imprisonment, and every such alien so landed shall be deemed to be unlawfully in the United States and shall be deported, as provided by law."

A man escaped, *in spite of due precautions* in that case; the man was a part of a *bona fide crew* of a foreign vessel, properly lying in the United States. There was no question of his having been signed in a foreign port to compete on his part with the seamen of this country, or unjust competition by the shipowner with other shipowners before the Court. The Supreme Court held that an undue standard of care on the part of the master was set by the verdict of the jury, and in the language above quoted, "even if the alien is a sailor," it showed that it intended its decision to apply to the facts of that case, *and not to any other sailor case*, and certainly not to all sailor cases.

The section under consideration in that case was amended in 1907 to include transportation, and the words "to adopt due precautions" stricken out, so that the Act now reads "to prevent the landing of such aliens," etc., and the word "negligent" inserted, so that the section now reads:

"and the negligent failure of any such owner, officer, agent to comply, etc."

Showing that Congress intended to extend the Act, undoubtedly in view of the Taylor case.

The case of *U. S. vs. Sandrey* was another case where a *bona fide* sailor escaped, and the Court intended that decision to apply to that case and no other, as shown by the following language, page 553:

“We are not dealing with a case where a vagrant sailor has been brought to this country and discharged in a destitute condition, nor with a case where the master of a vessel has connived with an immigrant within the objectional classes to smuggle him into this country *under cover of shipping articles*.”

There was certainly a smuggling of the prohibited classes into this country *under cover of shipping articles* in this case.

The case of *U. S. vs. Burke* was a case where a sailor escaped; he went back on board the vessel again, promised to stay, and the master undoubtedly thought, and had the right to think that he would stay. It was decided under the law of 1891. He escaped again, however, and the vessel was fined \$300.00, which the master refused to pay, was denied clearance, and obtained a writ of mandamus to compel clearance. The law at that time read:

“Sec. 6. That any person who shall bring into *or land* in the United States by vessel or otherwise, *or who shall aid* to bring into *or land* in the United States by vessel or otherwise, any alien not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment for term not exceeding one year, or by both such fine and imprisonment.”

The master of that vessel had not landed the sailor and the man in question in that case was undoubtedly entitled to land. *In this case contract laborers are excluded.* He was undoubtedly entitled to come into the United States as a part of a *bona fide* crew of his vessel, the complaint was that the master had *landed him*, which he certainly had not. *The contract labor* parts of the Act were not even indirectly involved in that case.

There is a wide distinction in the cases; the law has since been amended, and Judge Toulmin *passing on a similar state of facts to what exists in this case said*:

“I have carefully considered the ruling of the assistant secretary of the treasury in the case of the crew of the ‘Lancashire,’ which may be justified by the facts in that particular case, as they existed, and as they were doubtless made known to him. In that case the vessel which had been partly wrecked on the coast of Jamaica and partially restored there, and had changed flags, came to Mobile for docking and more complete repair; there to load a cargo for foreign trade. She had shipped at Kingston, besides the ordinary crew usually required on vessels of her class, a large number of additional men, who desired to come to the United States, and who were engaged at Jamaica to come to Mobile at a wage of one shilling per month each, to work chiefly at pumping the leaking vessel, and to be discharged; an absurdly small wage for the men.

Under such facts as existed in that case, these men, so working their passage at the equivalent of 25 cents for the month, but who were actually paid \$5 each for the month’s

service (where the ordinary wages were \$15 per month), and who stipulated for discharge here in the United States, were plainly immigrants, and properly treated as such, and therefore properly deported under the ruling of the secretary, and they, not because at all under the immigration laws, *but because they were not a bona fide crew of the ship.*"

The facts in this case, with the exception of the wages not being mentioned, are identical with that case, and the wages are immaterial.

In Treasury Decision No. 21724, the "Lancashire" case, the Treasury Department said, on the foregoing facts:

"If a contrary view were taken you will readily see that, by collusion with shipowners, or masters of vessels, it would be quite possible to effect the landing of aliens who are forbidden by law to come to this country, *simply through the device of signing them for the inward trip.*"

It would seem that was what was done on the "Bessie Dollar."

We now respectfully call the Court's attention to other parts of the decision of Mr. Beck, Acting Attorney General, portions of which are quoted in the opinion herein.

Following such quotation is the following:

"It is important, however, to remember that the salutary immigration statutes cannot be defeated by intending immigrants shipping as sailors. Judge Toulmin recognized this in the decision referred to by expressly approving the

ruling of your Department in the case of the 'Lancashire.' *Aliens who become seamen on vessels for the purpose of securing an entrance into this country free from the barriers of the immigration statutes are none the less alien immigrants, and can be treated as such.* In my judgment it is not important whether the master of the vessel who ships them was in collusion with them, or knew of their purpose to escape. Only such seamen are excepted from the class of passengers upon whom the head money tax is imposed, and from the class of alien immigrants, as are seamen in good faith and have no intention by reason of their passage to this country to leave the ship and make entry into this country."

This last language is no longer applicable, under the law as it now is, as intention to remain, is not material, as was said in the case of *U. S. vs. Taylor*, 207 U. S. 125, page 126:

"A reason for the construction adopted below was found in the omission of the word '*immigrant*' which had followed '*alien*' in the earlier acts. No doubt that may have been intended to widen the reach of the statute, but we see no reason to suppose that the omission meant to do more than *to avoid the suggestion that no one was within the Act who did not come here with intent to remain.*"

Further from Mr. Beck's opinion:

"*It does not follow because aliens are seamen* that they are free from such examination and inspection as you have either required or may hereafter require by regulation. By the immigration statutes Congress intended to exclude undesirable immigrants from entrance to this country, and the law should be interpreted so as to effectuate this object."



Contract laborers are made undesirable by the Act.

For a valuable decision, construing the case of the Holy Trinity Church see the matter of the "Lacemakers," 23 Op. of the Attorney General 381. The Lacemakers in that case were *contract laborers* and held not entitled to admission.

The word "alien" is not now within the statute. It now covers "contract laborers" without regard as to whether they are *aliens* or not, *or whether they come to stay or not*. In the case of *Grant Brothers vs. U. S.*, 232 U. S. 647, the men hired were but temporarily here.

In this case also the men were Chinese and without the right to come into the country at all. They were certainly in the United States, when in San Francisco, and when on board the "Mackinaw." See *In re Ross*, 140 U. S. 453.

And the mere bringing of a contract laborer is a violation of the Act whether he stays or not.

It will be seen that all of the cases affecting sailors cited, were decided under an entirely different state of facts to those in this case; that each one contains a reservation as to its general applicability; that an entirely different part of the law was under consideration, and that of necessity, there is a wide difference between the facts of a case where a man on a ship, lawfully in this country

on that ship, escapes, and this case where the defendants deliberately went to a foreign country and contracted with men who had no right to come to this country at all, they being Chinese. That they were in this country and entitled to all of the privileges, and subject to all of the burdens of American seamen, cannot be disputed.

It seems that the decision of this Court herein, if allowed to stand will lead to a very serious and unfortunate state of affairs, and we therefore respectfully submit, that this case should be reconsidered.

Respectfully,

H. W. HUTTON,  
*Attorney for Plaintiff in Error.*

I hereby certify, that, in my judgment the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

H. W. HUTTON,  
*Attorney for Plaintiff in Error.*

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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SCANDINAVIAN-AMERICAN BANK,  
a Corporation,

and Appellant,

vs.

R. L. SABIN, Trustee of the Estate of  
D. Sondheim, Bankrupt,

and Appellee,

In the Matter of D. Sondheim, Bankrupt.

**PETITION FOR REVISION**

Under Section 24b of the Act of Congress Approved  
July 1, 1898, to Revise a certain Order of the  
District Court of the United States for the Dis-  
trict of Oregon; and

**TRANSCRIPT OF RECORD.**

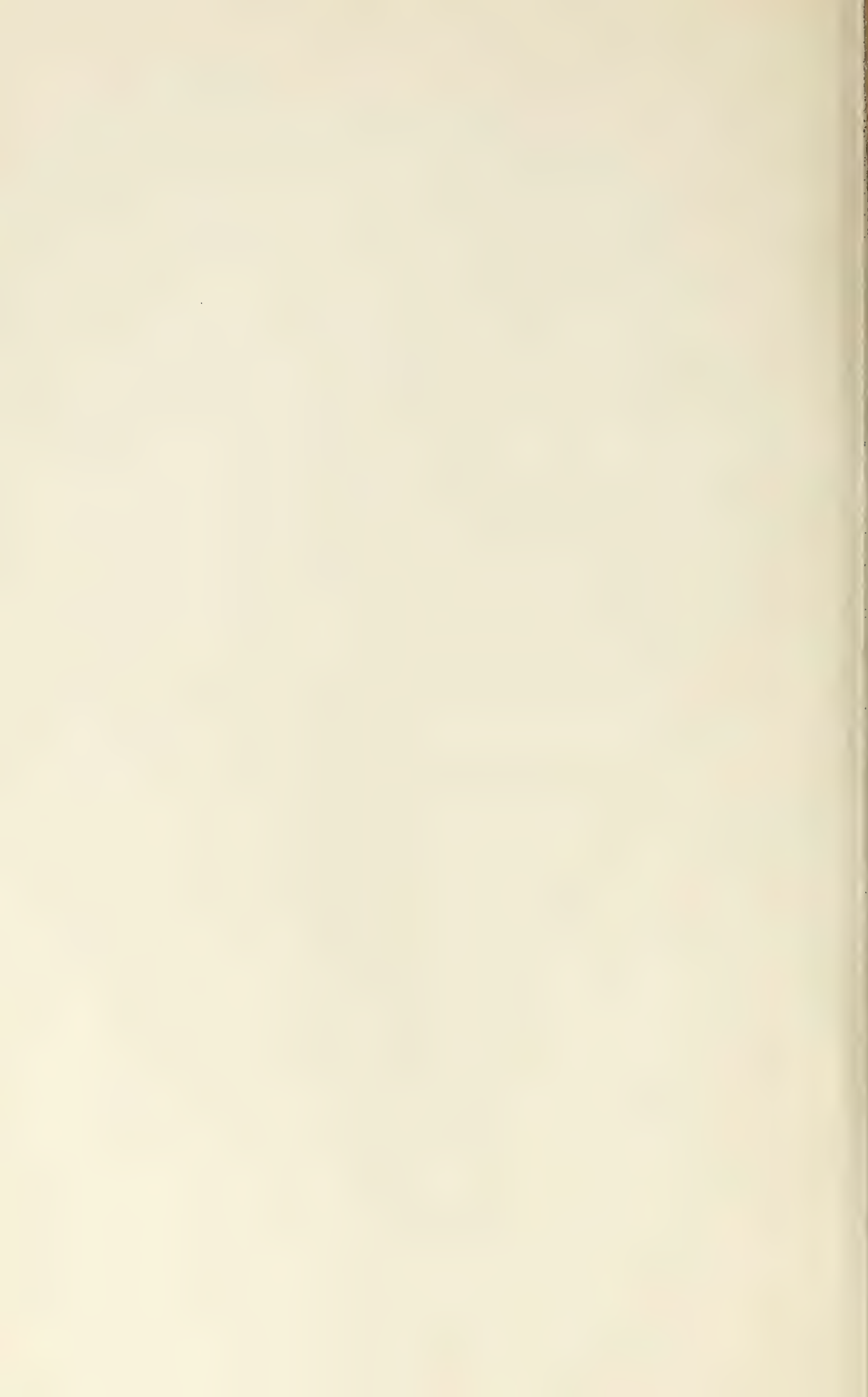
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Upon Appeal from the District Court of the United  
States for the District of Oregon.

JUN 10 1915

F. D. Monckton,

Clerk.



No. \_\_\_\_\_

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

SCANDINAVIAN-AMERICAN BANK,  
a Corporation,

and Appellant,

vs.

R. L. SABIN, Trustee of the Estate of  
D. Sondheim, Bankrupt,

and Appellee,

In the Matter of D. Sondheim, Bankrupt.

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Upon Appeal from the District Court of the United  
States for the District of Oregon.





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*In the United States Circuit Court of Appeals,  
for the Ninth Circuit.*

SCANDINAVIAN-AMERICAN BANK,  
a Corporation,

Petitioner and Appellant,

vs.

R. L. SABIN, Trustee of the Estate of  
D. Sondheim, Bankrupt,

Respondent and Appellee,

In the Matter of D. Sondheim, Bankrupt.

Names and Addresses of the Attorneys of Record:

Sidney J. Graham, Yeon Building, Portland,  
Oregon, for Appellant.

Sidney Teiser, Morgan Building, Portland, Ore-  
gon, for the Appellee.



**IN THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT.**

In the Matter of	}	<b>PETITION FOR REVISION</b>
D. SONDHEIM,		
Bankrupt.		
SCANDINAVIAN - AMERICAN	}	
BANK, a Corporation,		
Petitioner,		
vs.	}	
R. L. SABIN,		
Trustee.		

**TO THE HONORABLE JUDGES** of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the Scandinavian-American Bank, a banking corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the City of Portland, and complaining of the order and decree made and rendered on May 17, 1915, against this petitioner by the Hon. Robert S. Bean, Judge of the District Court of the United States, for the District of Oregon, and the subsequent order and decree

made and rendered on the 21st day of May, 1915, against this petitioner by the Hon. Robert S. Bean, Judge of the District Court of the United States, for the District of Oregon, says:

That D. Sondheim, the bankrupt herein, is indebted to this petitioner in the sum of more than \$4000.00; that on November 16, 1914, a petition in involuntary bankruptcy was filed against the said D. Sondheim, in the District Court of the United States, for the District of Oregon; that on the 20th day of November, 1914, R. L. Sabin, as receiver, filed a petition in said District Court of the United States, for the District of Oregon, requesting that this petitioner be required to deliver to him as receiver, or to the Trustee hereinafter to be elected, a certain stock of merchandise in the possession of this petitioner; that thereafter said stock of merchandise, pursuant to a stipulation entered into between this complainant and the receiver, was sold and the proceeds realized therefrom in the sum of \$3476.76 were deposited with this petitioner to abide the decision of the Court as to the ownership of said property; that thereafter the petition and the answer of this petitioner were referred to A. M. Cannon, Esquire, as Special Master, to hear the parties therein and take such evidence as might be desired to be introduced as to the rights of the parties to the property or its proceeds, and to report his findings to the Court; that thereafter said A. M. Cannon, as Special Master, duly took said evidence

and made and filed his findings and recommendations wherein he recommended that such order or decree be entered as would restore to the Trustee, the funds representative of the property in controversy; that thereafter your petitioner filed exceptions to the report of the Special Master, which exceptions were overruled and the orders under date of May 17 and May 21, 1915, hereinabove complained of, entered; that upon the record herein your petitioner contended in said District Court, and he now contends in this Court:

First. That under the agreement entered into between this petitioner and the bankrupt and the understanding and intention of the parties as shown by the testimony developed at the hearing before the Special Master, the title to the said stock of goods remained in the bank and that in any view of the agreement, a trust was created, and your petitioner is entitled to hold said goods until his indebtedness has been repaid.

Second. That if the agreement be regarded as a chattel mortgage it is valid under the laws of the State of Oregon, and the fact that your petitioner had possession of the property before the lien of any creditor attached, and before the petition in bankruptcy was filed, cures the failure to record it or acknowledge it so as to entitle it to record.

Third. That with respect to property not in the custody of the bankruptcy court the Trustee is

simply vested with the rights, remedies and powers of a judgment creditor, holding an execution duly returned unsatisfied, and since neither any creditors of the bankrupt nor the Trustee himself secured any lien upon this personal property, it follows that the Trustee could insist upon no greater rights in the stock of goods than D. Sondheim, the bankrupt, had.

That on May 17, 1915, said judge rendered an oral opinion in this cause holding that the agreement with D. Sondheim did not create a trust; that the said agreement was void as to creditors under the laws of the State of Oregon; that the possession of the stock of merchandise availed your petitioner nothing and that the Trustee had jurisdiction to question the agreement in controversy, and there was made and entered on said date in said District Court and in this cause, an order and decree, a copy of which is hereto attached and marked Exhibit "A" overruling your petitioner's exceptions to the report of the Special Master, and that on the 21st day of May an order and decree was made and entered in said District Court in this cause, a copy of which is hereto attached and marked Exhibit "B"; that said orders of the District Court were erroneous in matters of law, because:

1. They overruled the exceptions of your petitioner to the Special Master's report.

2. They failed to sustain the exceptions of your petitioner to the Special Master's report.

3. They confirmed the report of the Special Master and further ordered that this bank pay to the Trustee the sum of \$1000.43, and the costs and disbursements of the proceeding.

4. They confirmed the report of the Special Master holding the agreement in controversy did not amount to a contract of conditional sale or create a trust.

5. They confirmed the report of the Special Master holding the agreement in controversy void as a chattel mortgage under the laws of the State of Oregon.

6. They confirmed the report of the Special Master holding that the possession of the property by this bank prior to a levy by any creditor and prior to the filing of the petition in involuntary bankruptcy did not entitle this bank to hold said goods until its indebtedness was repaid.

7. They confirmed the report of the Special Master holding that the Trustee could question this conveyance.

WHEREFORE, your petitioner feeling aggrieved because of such orders and decrees, asks that the same may be revised in a matter of law by the Honorable Court as provided in Section 24b of the bankruptcy law of 1898, and the rules and practice in such case provided.



SCANDINAVIAN-AMERICAN BANK,  
a Corporation.

UNITED STATES OF AMERICA, )  
State and District of Oregon, ) ss.  
Multnomah County, )

Anthon Eckern makes oath and says that he is cashier of the Scandinavian-American Bank, a corporation, petitioner above named, and the foregoing petition for revision and review is true as he verily believes.

ANTHON ECKERN.

Subscribed and sworn to before me this 29th day of May, 1915.

O. C. BORTZMEYER,  
Notary Public for Oregon.

(Seal)

(Internal Revenue Stamp, 10c, Cancelled.)

(Exhibit A referred to in the foregoing petition is the order of Court filed May 17, 1915, and is on page 71 of this record. Exhibit B referred to in the foregoing petition is the decree filed on May 21, 1915, and is on page 72 of this record.)

No. \_\_\_\_\_

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

SCANDINAVIAN-AMERICAN BANK,  
a Corporation,

Appellant,

vs.

R. L. SABIN, Trustee of the Estate of  
D. Sondheim, Bankrupt,

Appellee,

In the Matter of D. Sondheim, Bankrupt.

**TRANSCRIPT OF RECORD**

Upon Appeal from the District Court of the United  
States for the District of Oregon.

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## **CITATION ON APPEAL.**

UNITED STATES OF AMERICA, )  
District of Oregon, ) ss.

To R. L. Sabin, Trustee of the Estate of D. Sondheim, bankrupt, Greeting:

WHEREAS, Scandinavian - American Bank, a corporation, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, Oregon, in said District, this 26th day of May in the year of our Lord, one thousand nine hundred and fifteen.

CHARLES E. WOLVERTON, Judge.

STATE OF OREGON,        }  
County of Multnomah, } ss.

Due service of the within Citation on Appeal is hereby accepted in Multnomah County, Oregon, this 27th day of May, 1915, by receiving a copy thereof, duly certified to as such by Sidney J. Graham, attorney for Scandinavian-American Bank.

SIDNEY TEISER,

Attorney for R. L. Sabin, Trustee.

Filed May 27, 1915. G. H. Marsh, Clerk.



**IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF OREGON,  
NOVEMBER TERM, 1914.**

Be it remembered, that on the 19th day of November, 1914, there was duly filed in the District Court of the United States for the District of Oregon, a Petition for Order requiring the Scandinavian-American Bank to turn over certain property, in words and figures as follows, to-wit:

**PETITION OF RECEIVER.**

In the Matter of	}
D. SONDHEIM,	
Bankrupt.	

To Honorable Charles E. Wolverton and Honorable R. S. Bean, Judges of the District Court of the United States for the District of Oregon:

Comes now R. L. Sabin, receiver of the above entitled cause, and reports and petitions as follows:

I.

That he was the duly appointed receiver of the above entitled estate on the 16th day of November, 1914, and has qualified as such receiver by filing the requisite bond which bond has been approved and accepted herein.

## II.

That as such receiver he has made demand for the stock and fixtures of the alleged bankrupt situated in the store building at No. 147 Sixth street, Portland, Oregon.

## III.

That said stock and fixtures are claimed by the Scandinavian-American Bank of Portland, Oregon, under and by virtue of a certain instrument of writing, copy of which is herewith attached marked "Exhibit A" and which is in effect and in fact a mortgage securing the said bank for the payment of the sum of \$2600.00 or such portion thereof as may be due and unpaid under which said mortgage the said bank took possession of said stock at 4 o'clock on the afternoon of Friday, November 13, 1914.

## IV.

That the said stock consists of merchandise which was on hand at the time the said mortgage was entered into, together with various other property which was purchased since the entering into of said mortgage.

## V.

That said mortgage or agreement has not been recorded nor is it so acknowledged as to entitle it to record and that the same is therefore void as to creditors of said alleged bankrupt.

VI.

That the insurance upon said property is in the name of D. Sondheim.

VII.

That said bank has refused to deliver possession of said stock, although demand has been made upon it for the same.

VIII.

That said property is in fact and effect the property of said alleged bankrupt, and possession thereof should be delivered to the receiver.

IX.

That if the said Scandinavian-American Bank has any claim against said stock by virtue of said instrument herewith attached, it can maintain said claim against the proceeds in the hands of the receiver, or the Trustee hereinafter to be elected.

X.

That the said bank is now selling the said stock at retail.

Wherefore your receiver prays that an order be made directing said Scandinavian-American Bank of Portland, Oregon, and any other person in possession of said property for or on behalf of said

Scandinavian-American Bank forthwith to deliver said stock to the receiver, and to account to said receiver, or to the Trustee hereinafter to be elected for the proceeds of said stock which has been disposed of since they took possession under said instrument of writing or mortgage herewith attached.

Respectfully submitted,

R. L. SABIN, Receiver.

UNITED STATES OF AMERICA, )  
District and State of Oregon,        } ss.  
County of Multnomah,                }

I, R. L. Sabin, being first duly sworn, depose and say that I am the duly appointed receiver in the above proceeding, whose name is signed to the foregoing petition, and that all the facts contained therein are true as I verily believe.

R. L. SABIN.

Subscribed and sworn to before me this 19th day of November, 1914.

O. S. CROCKER,

Notary Public for Oregon, Residing at Tigard,  
Washington County.

(Seal)

(Exhibit A referred to in the foregoing petition is Exhibit A attached to the amended answer and is printed on page 28 of this record.)

Filed November 19, 1914. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 25th day of November, 1915, there was duly filed in said Court, and cause a Stipulation to Sell Property in words and figures as follows, to-wit:

### **STIPULATION.**

It is hereby stipulated and agreed by and between R. L. Sabin as receiver, through his attorney Sidney Teiser, and the Scandinavian-American Bank of Portland, Oregon, through its attorney Sidney J. Graham, as follows:

That whereas the Scandinavian-American Bank has possession of a certain stock of merchandise at No. 147 Sixth Street, Portland, Oregon.

And whereas the receiver lays claim to said stock of merchandise as part of the estate of the bankrupt; that the parties hereto consent that a sale of said stock of merchandise may be made under the following conditions:

First. That a joint inventory of said stock of merchandise shall be made by a representative to be selected by the bank and a representative to be selected by the receiver, but the price at which said property is to be inventoried shall be left to the sole determination of the receiver or his representative.

Second. That the said stock shall be sold by R. L. Sabin within ten days from the date of this



stipulation to the highest and best bidder therefor, it being understood and agreed that the Scandinavian-American Bank has the right to enter a bid for said stock the same as any other prospective purchaser.

Third. That the money received from the sale of the said stock of merchandise be deposited in the Scandinavian-American Bank to abide the decision of this Court as to the ownership of said stock of merchandise.

Fourth. That the Scandinavian-American Bank deliver to R. L. Sabin as receiver a cashier's check for said sum of money so deposited with it to be paid by it to R. L. Sabin, receiver, should the Court hold that the stock and fixtures are the property of the estate in bankruptcy, and to be surrendered by R. L. Sabin if the Court finds the ownership of the goods to be in the Scandinavian-American Bank.

It is also stipulated and agreed between the parties that neither party hereto shall have any claim upon the other for damages on account of the claim of the other to said stock of merchandise and that this stipulation is not binding until approved by the Court, but this provision shall in no wise effect the right of the receiver or Trustee in bankruptcy to an accounting for the moneys had and received by the Scandinavian-American Bank under and by reason of an instrument entered into between D. Sondheim and the Scandinavian-American Bank

dated October 23, 1914, which is attached to the Petition of Receiver for an order to show cause filed in this Court on the 20th day of November, 1914, if the stock and fixtures in question be determined to be the property of said estate.

SIDNEY TEISER,  
Attorney for Receiver.

SIDNEY J. GRAHAM,  
Attorney for Scandinavian-American Bank.

Approved Nov. 25, 1914.

CHAS. E. WOLVERTON, Judge.

Filed November 25, 1914. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 25th day of November, 1914, there was duly filed in said Court and cause an Order to Sell Property in words and figures as follows, to-wit:

**ORDER.**

On this day this cause comes on to be heard upon the application of Sidney Teiser, attorney for the receiver, and Sidney J. Graham, attorney for the Scandinavian-American Bank, for an order based upon a stipulation on file herein between the said parties authorizing the sale under the terms and conditions of said stipulation of that certain stock of merchandise located at No. 147 Sixth street, Port-

land, Oregon, and it appearing to the Court that it is to the best interests of the estate that said stipulation entered into between the parties be enforced.

It is ordered that R. L. Sabin as receiver and the Scandinavian-American Bank are hereby authorized and directed to make an inventory of said stock of merchandise and that R. L. Sabin is authorized and directed to sell the said stock of merchandise subject to the approval of this Court to the highest and best bidder therefor for cash within ten days from the date of this order.

It is further ordered that the money realized from the sale of said stock of merchandise be deposited with the Scandinavian-American Bank of Portland, Oregon, to abide the decision of this Court as to the ownership of the said stock of goods or to the proceeds realized from the sale thereof, and that the said Scandinavian-American Bank issue to R. L. Sabin as receiver, a cashier's check therefor to be paid by the said bank if the Court finds that the said stock of merchandise or the proceeds thereof belong to the estate and to be surrendered by said R. L. Sabin if the Court finds said stock of merchandise or the proceeds thereof belong to the said Scandinavian-American Bank.

CHAS. E. WOLVERTON,

Judge.

Dated Nov. 25, 1914.

Filed November 25, 1914. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 4th day of February, 1915, there was duly filed in said Court, and cause, an Amended Answer of the Scandinavian-American Bank, in words and figures as follows, to-wit:

**ANSWER.**

To the Honorable Chas. E. Wolverton and the Honorable Robert S. Bean, judges of the above entitled Court:

Comes now the Scandinavian-American Bank and without objecting to the jurisdiction of this Court summarily to try this matter files herein its amended answer to the petition of the receiver as follows:

I.

Admits Paragraph I.

II.

Admits Paragraph II.

III.

Denies Paragraph III and the whole thereof except that your respondent admits the execution of a certain instrument in writing attached to the petition of the receiver and marked Exhibit "A"; that your respondent took possession of said stock November 13, 1914.

## IV.

Denies Paragraph IV and the whole thereof.

## V.

Admits that said instrument was not recorded nor acknowledged so as to entitle it to record but denies each and every other allegation of Paragraph V and the whole thereof.

## VI.

Admits Paragraph VI.

## VII.

Admits Paragraph VII.

## VIII.

Denies Paragraph VIII and the whole thereof.

## IX.

Denies Paragraph IX and the whole thereof.

## X.

Denies Paragraph X and the whole thereof.

And for a first further and separate answer and defense to said petition the Scandinavian-American Bank alleges:



## I.

That at all the times herein mentioned and now it has been a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its office and principal place of business in the City of Portland, Multnomah County, Oregon, and that it is engaged in a general banking business.

## II.

That on or about the 23d day of October it advanced the sum of \$2600.00 to D. Sondheim for the purchase of the stock of merchandise at No. 147 6th Street, Portland, Oregon, and entered into an agreement in writing with the said D. Sondheim, a copy of which said agreement is hereto attached marked Exhibit "A" and made a part hereof; that under and by virtue of said agreement and the understanding and intention of the parties, the title to said stock of merchandise remained in this respondent.

## III.

That on or about the 13th day of November, 1914, the said D. Sondheim surrendered the possession of said stock of merchandise to this respondent who is now and since that time has continued in possession thereof; that your respondent has a complete record and the invoices of all purchases of merchandise or other property made by the said D. Sondheim and

added to the stock of merchandise since its purchase by it.

#### IV.

That in addition to the sum of \$2600.00 advanced to the said D. Sondheim for the purchase of said stock of goods, said D. Sondheim was indebted to this respondent in the sum of \$2600.00 on account of loans made to the said D. Sondheim on the 11th day of December, 1913, and the 8th day of July, 1914; that no part of either of said sums or the interest thereon has been paid, save and except the sum of \$2060.43 received on account thereof and that there is still due and owing from said D. Sondheim to this respondent the sum of \$3139.57 with interest thereon at the rate of 8 per cent per annum.

#### V.

That the said stock of goods, wares and merchandise is of the value of \$3476.70.

#### VI.

That your respondent acted in good faith in all its dealings with the said D. Sondheim upon a sufficient consideration and without any intent to hinder, delay or defraud any creditors of the said D. Sondheim.

And for a second and separate answer and defense to said petition the Scandinavian-American Bank alleges:

I.

That at all times herein mentioned and now it has been a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its office and principal place of business in the City of Portland, Multnomah County, Oregon, and that it is engaged in a general banking business.

II.

That on or about the 23d day of October it advanced the sum of \$2600.00 to D. Sondheim for the purchase of the stock of merchandise at No. 147 6th Street, Portland, Oregon, and entered into an agreement in writing with the said D. Sondheim, a copy of which said agreement is hereto attached marked Exhibit "A" and made a part hereof; that under and by virtue of said agreement and the understanding and intention of the parties, the title to said stock of merchandise remained in this respondent.

III.

That on or about the 13th day of November, 1914, the said D. Sondheim surrendered the possession of said stock of merchandise to this respondent who is now and since that time has continued in possession thereof; that your respondent has a complete record

and the invoices of all purchases of merchandise or other property made by the said D. Sondheim and added to the stock of merchandise since its purchase by it.

#### IV.

That in addition to the sum of \$2600.00 advanced to the said D. Sondheim for the purchase of said stock of goods, said D. Sondheim was indebted to this respondent in the sum of \$2600.00 on account of loans made to the said D. Sondheim on the 11th day of December, 1913, and the 8th day of July, 1914; that no part of either of said sums or the interest thereon has been paid, save and except the sum of \$2060.43 received on account thereof and that there is still due and owing from said D. Sondheim to this respondent the sum of \$3139.57 with interest thereon at the rate of 8 per cent per annum.

#### V.

That the said stock of goods, wares and merchandise is of the value of \$3476.70.

#### VI.

That your respondent was in possession of said stock of goods, wares and merchandise before any other right or lien of any other creditor attached and before a levy thereon by any creditor; that said sums of money were furnished to the said D. Sondheim in good faith for a sufficient consideration and with-

out any intent to hinder, delay or defraud any creditor of the said D. Sondheim.

And for a third further and separate answer and defense the Scandinavian-American Bank alleges:

I.

That at all the times herein mentioned and now it has been a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its office and principal place of business in the City of Portland, Multnomah County, Oregon, and that it is engaged in a general banking business.

II.

That on or about the 23d day of October it advanced the sum of \$2600.00 to D. Sondheim for the purchase of the stock of merchandise at No. 147 6th Street, Portland, Oregon, and entered into an agreement in writing with the said D. Sondheim, a copy of which said agreement is thereto attached marked Exhibit "A" and made a part hereof; that under and by virtue of said agreement and the understanding and intention of the parties, the title to said stock of merchandise remained in this respondent.

III.

That on or about the 13th day of November, 1914, the said D. Sondheim surrendered the possession of



said stock of merchandise to this respondent who is now and since that time has continued in possession thereof; that your respondent has a complete record and the invoices of all purchases of merchandise or other property made by the said D. Sondheim and added to the stock of merchandise since its purchase by it.

#### IV.

That in addition to the sum of \$2600.00 advanced to the said D. Sondheim for the purchase of said stock of goods, said D. Sondheim was indebted to this respondent in the sum of \$2600.00 on account of loans made to the said D. Sondheim on the 11th day of December, 1913, and the 8th day of July, 1914; that no part of either of said sums or the interest thereon has been paid, save and except the sum of \$2060.43 received on account thereof and that there is still due and owing from said D. Sondheim to this respondent the sum of \$3139.57 with interest thereon at the rate of 8 per cent per annum.

#### V.

That the said stock of goods, wares and merchandise is of the value of \$3476.70.

#### VI.

That your respondent acted in good faith in all its dealings with the said D. Sondheim upon a sufficient consideration and without any intent to

hinder, delay or defraud any creditors of the said D. Sondheim.

## VII.

That said creditors of said D. Sondheim had actual notice and knowledge of the claim of this respondent; that said creditors were not deceived thereby; that the claims of the said creditors had arisen and credit had been given them prior to the 23d day of October, 1914, the time when your respondent advanced the sum of money for the purchase of said stock of goods, wares and merchandise; that in equity and good conscience said creditors ought not be heard to say that said dealings between your respondent and the said D. Sondheim were fraudulent and void.

WHEREFORE the Scandinavian - American Bank having fully answered the petition of the receiver prays that the said petition may be dismissed with costs.

SIDNEY J. GRAHAM,

Attorney for Scandinavian-American Bank.

**"EXHIBIT A."**

Agreement entered into this 23d day of October, 1914, by and between D. Sondheim, party of the first part, and the Scandinavian-American Bank, party of the second part, witnesseth:

Whereas, The Scandinavian-American Bank has furnished to D. Sondheim the sum of \$2600.00 to be used to purchase the goods, wares and merchandise of the store located at 146 Sixth Street, Portland, Oregon, under an agreement to protect the said party of the second part absolutely on said purchase.

Now therefore, said agreement is hereby reduced to writing and executed between the parties of the first part and second part in the following manner and form, to-wit:

It is understood and agreed between the parties hereto that the goods, wares and merchandise heretofore named were purchased with the money furnished by the party of the second part, and that said D. Sondheim holds title in the same as Trustee for the said party of the second part in so far as the holding of said title is necessary to protect and pay back to the party of the second part the sums of money owing by the party of the first part to the party of the second part.

It is understood and agreed that the party of the first part shall proceed to sell the said goods, wares and merchandise in the regular course of business,

and shall keep an accurate account of each day's sales, and one-half of the moneys taken in for the sale of said goods at the close of each day shall be turned over to the party of the second part at the opening of its banking hours the following day, until such time as the \$2600.00 advanced by the party of the second part, and any other indebtedness to the extent of \$2600.00 owing by the party of the first part to the party of the second part shall have been fully paid and satisfied.

It is further understood that the party of the second part shall have the right to install a cashier, whose wages shall be paid as part of the running expenses of the business by the party of the first part, to keep track of the receipts and disbursements from the sale of said merchandise, and to be cashier in charge of all moneys handled during said sale, said party to have access to all books, records, bills and invoices in connection with the said business heretofore referred to, and the sale and disposal of the same.

It is further stipulated that no sale of the bulk of said articles, goods, wares and merchandise first above named, shall be made without the consent of the party of the second part.

In witness whereof, the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by its duly authorized officers and its cor-

porate seal to be affixed, to this and another instrument of like import and tenor, the day and year first above written.

(Signed) D. SONDHEIM, (Seal)  
Party of the First Part.

SCANDINAVIAN-AMERICAN BANK,  
By Anthon Eckern, Cashier Scandinavian-American  
Bank.

By \_\_\_\_\_,  
Party of the Second Part.

STATE OF OREGON,     }  
County of Multnomah, } ss.

I, Anthon Eckern, being first duly sworn, depose and say that I am cashier of the Scandinavian-American Bank, a corporation, respondent in the above entitled matter; and that the foregoing answer is true as I verily believe.

ANTHON ECKERN.

Subscribed and sworn to before me this 25th day of January, 1915.

(Seal)                                   A. L. MORLAND,  
Notary Public for the State of Oregon.

Filed February 4, 1915. G. H. Marsh, Clerk.



And afterwards, to-wit, on the 15th day of March, 1915, there was duly filed in said Court and cause an Order referring Petition to a Special Master, in words and figures as follows, to-wit:

**ORDER OF REFERENCE TO MASTER.**

BEFORE HONORABLE CHAS. E. WOLVERTON, AND HONORABLE R. S. BEAN, JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON:

This cause coming on this day to be heard upon the petition of R. L. Sabin, as receiver, for an order directing the Scandinavian-American Bank to turn over certain property belonging to the alleged bankrupt herein, and upon the order of this Court entered the 25th day of November, 1914, under stipulation of the parties herein, directing the receiver to sell the property petitioned to be turned over and that the money therein should take the place of and stand for the property itself, and upon the amended answer of the Scandinavian-American Bank filed in this court waiving the objections to the jurisdiction of the court herein to try the matter summarily, and upon the stipulation made in open court by the attorneys for the parties herein to the effect that the Trustee, R. L. Sabin, has authority to proceed in this matter in place of the receiver without further order of the Court, and upon further stipulation that the matter be referred to A. M. Cannon, Esquire, as Special Master to hear the

parties herein and take such evidence as they might desire to introduce as to the right to said property or its proceeds and report the same with his findings to this Court,

### IT IS ORDERED

that the controversy herein concerning the right of the respective parties to the property in question or the proceeds thereof be, and the same is hereby referred to A. M. Cannon, Esquire, as Special Master, with directions to take such testimony and evidence as may be submitted to him, hear the parties as to their respective contentions, and to report to this Court with his findings and recommendations therein.

R. S. BEAN, Judge.

Filed March 15, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 19th day of April, 1915, there was duly filed in said Court and cause, the report of Special Master in words and figures as follows, to-wit:

### REPORT OF SPECIAL MASTER.

TO THE HONORABLE DISTRICT COURT  
ABOVE NAMED:

The undersigned Special Master, to whom was referred the petition of the estate of said bankrupt

to require the Scandinavian-American Bank to turn over to the said estate a certain stock of goods, has the honor to make the following report:

### **STATEMENT OF FACTS.**

The material facts, as developed by the testimony, stipulation and documents on file, are as follows:

On and prior to October 22, 1914, D. Sondheim, the bankrupt, was engaged in the general mercantile business in Portland and elsewhere, buying and retailing bankrupt stocks of merchandise, and was, upon said date, indebted to the respondent, Scandinavian - American Bank, upon three promissory notes for the principal sum of \$3600.00, of which there remained unpaid \$2600.00, all past due.

On or about October 22, 1914, Sondheim, in contemplation of the purchase of the bankrupt stock of merchandise known as the D. N. Pally stock in Portland, applied to the bank for an additional loan of \$2600.00 to enable him, in part, to make the proposed purchase, his net bid therefor having been \$5680.00. To this the bank consented, and thereupon Sondheim gave it his note for \$2600.00, the bank credited his account therewith, and an instrument in writing, copy of which is attached to the pleadings herein, was thereupon executed by the parties, in which it is recited, among other things, "That the Scandinavian-American Bank has fur-

nished to D. Sondheim the sum of \$2600.00 to be used to purchase the goods, wares and merchandise of the stock located at 146 Sixth Street, Portland, Oregon, under an agreement to protect the said party of the second part absolutely on said purchase" \* \* \* "and that said D. Sondheim holds title to the same as Trustee for the said party of the second part insofar as the holding of said title is necessary to pay the party of the second part the sums of money owing by the party of the first part to the party of the second part."

It was stipulated in this instrument that the bank might install a cashier in the store to keep an account of the sales and the money taken in, and that Sondheim should turn over to it one-half the proceeds of the daily sales. This provision was not observed, but aside from it the understanding was that, to save the bank bookkeeping, in lieu thereof, Sondheim should pay the bank \$500.00 each week until the indebtedness was discharged. In practice neither requirement was respected by Sondheim.

Sondheim thereupon purchased the stock as planned, opened the store and continued the business until a few days prior to November 13, 1914, when he disappeared from Portland, has not been heard from since, and his whereabouts are now unknown.

During the time Sondheim was in possession of this stock, he was so as sole and exclusive owner;

he paid much more for the stock than the sum secured from the Bank; the muniment of title was his and not the bank's; the bank did not take possession through Sondheim, or any other person; no account of sales was rendered by Sondheim to the bank; the proceeds from the sales were deposited by him in the bank to his own credit in the ordinary course of business and commingled with funds received from other sources; the account was at all times subject to his check; and he was permitted to, and did, make large additional purchases of merchandise, claims for which are now made against the remainder of his estate.

On November 13, 1914, actions were brought by creditors against Sondheim and writs of attachment issued against his several mercantile establishments, the one in controversy among others. Before, however, this store could be taken into custodia legis, respondent bank, becoming apprised of the situation, entered the store, took possession and placed in charge one Eftland as agent or representative. This was upon the same day, and but a few hours before, the attempt to levy the attachment was made. Consequently, no levy could be made of the writ and this store was at no time levied upon.

Thereafter, this proceeding was commenced by the receiver appointed by this Court against the bank, and, by stipulation of the parties, the stock of goods was sold by the receiver and the money



derived from the sale deposited in lieu of the merchandise to abide the result hereunder.

My impression is, and I so find, that the bank entered into the contract with Sondheim in good faith and with no actual intent upon its part to hinder, delay or defraud creditors, but, further than insisting that Sondheim should make payments upon his indebtedness from time to time, the bank paid no attention to the operation of the business and never intended to, and did not, require any accounting by Sondheim of the sales made by him, and did not, and made no attempt to, acquire information concerning the running of the business further than to require Sondheim to pay \$500.00 upon his indebtedness once each week, and this requirement was not insisted upon by the bank and was not lived up to by Sondheim.

## **OBSERVATIONS AND CONCLUSIONS OF LAW.**

The contract or agreement entered into by the parties is quite ambiguous in its character, but, looked at by the four corners, under the light shed by the testimony, it becomes apparent that nothing more was intended by it than that the bank should have security for its loan. It attests the understanding that the bank furnished the money to Sondheim, "under an agreement to protect the second party (the bank) absolutely"; further, "that

said D. Sondheim holds title in the same as Trustee for the said second party insofar as the holding of said title is necessary to protect and pay back the sums of money owing by the party of the first part to the party of the second part," but no further. Counsel for the bank maintains that the situation comes within the rule stated in *In re Cattus*, 183 Fed. 733, and other cases of like import construing trust receipts or agreements, but these cases do not apply here because the respondent bank at no time owned, or had title to, this property; it belonged to Sondheim from first to last, and trusteeship of a title itself presupposes a cestui que trust with the ownership thereof, in whole or in part. For the same reason, the transaction cannot be said to constitute a conditional sale contract.

In this case we have existing between Sondheim and the bank the common relation of debtor and creditor with the bank attempting to secure itself for the loan made by a **lein** upon the merchandise owned by Sondheim, and no unusual words or splendor of phraseology can make out of the transaction anything different. Hence this instrument, I conclude, was intended to be, and is, a chattel mortgage upon the goods, wares and merchandise mentioned therein. No other legal classification can be given this document under the laws of this state, so, if it is not a chattel mortgage, it is nothing.

It is not pretended that this instrument or chattel mortgage was recorded. It also is the fact that

until general alarm spread among Sondheim's creditors because of his disappearance, some twenty days after the execution of the mortgage, no move was made by the bank to take possession under the same and nothing whatever had taken place off the record that would apprise any creditor that the bank had, or claimed, any **lein** upon this stock. For all that appeared to the world, the bank had no claim to, or **lein** upon, or interest in, these assets. Under such circumstances, while no actual fraud may have been intended by the bank, a legal fraud was nevertheless perpetrated upon the other creditors of Sondheim.

The principal question then, in this case, is whether this mortgage is void under the laws of Oregon as construed by its highest Court. Section 799, Lord's Oregon Laws, is as follows:

“Every sale of personal property, capable of immediate delivery to the purchaser, and every assignment of such property, by way of mortgage or security, or upon any condition whatever, unless the same be accomplished by an immediate delivery, and be followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller or assignor, during his possession, or as against subsequent purchasers in good faith and for a valuable consideration, disputable only by making it appear on the part of the person claiming under such sale or

assignment that the same was made in good faith, for a sufficient consideration, and without intent to defraud such creditors or purchasers; but the presumption herein specified does not exist in the case of a mortgage duly filed or recorded as provided by law."

I think it cannot be open to question, at this day, that, under this statute, as construed by the Supreme Court of Oregon, and upon general equitable principles as announced by that Court, a chattel mortgage upon a shifting stock of merchandise which is not recorded, and under which the mortgagor is permitted by the mortgagee to remain in possession of the same, selling in due course of business, replenishing by new purchases upon credit, and not accounting to the mortgagee for the proceeds, is void as to all creditors' general, attachment or judgment **lein**.

Orton vs. Orton, 7 Ore. 478.

Jacobs vs. Irvin, 9 Ore. 52.

Bremer vs. Fleckenstein, *id* 266.

Pierce vs. Kelley, 25 Ore. 95.

Gregg vs. Mueller, 66 Ore. 27.

In Orton vs. Orton, *supra*, it was held, upon general principles, that such a mortgage is void absolutely, the Court saying:

"But the statute (now Sec. 799, L. O. L., *supra*) is silent as to the effect of a provision

in a mortgage or an agreement between a mortgagor and a mortgagee that the mortgagor may sell the mortgaged property.

When this fact is made to appear, as in this case, then it becomes a question of law for the Court to determine what shall be the legal effect of such an agreement as affecting creditors of the mortgagor. \* \* \* We think the weight of authority, as well as the reason, is in favor of the rule before indicated—that where there is unlimited power given by the mortgagee to the mortgagor to sell the mortgaged property which still remains in his possession, that the mortgage is void as against attaching creditors of mortgagor.”

The doctrine of this case still obtains without modification in relation to any similar state of facts, and the presumption of fraud spoken of in the statute becomes conclusive as pertains to the situation in this case, under the rule announced by Judge Bean in *Pierce vs. Kelley*, *supra*.

In any event, it is enough, for the purpose of this report, that the Court of Appeals of this Circuit, in a late case, has specifically accepted this to be the doctrine of the Supreme Court of Oregon, and such acceptance is conclusive in this case.

*Peterson vs. Sabin*, 214 Fed. 234.



Counsel for the bank relies upon the rule announced in *Currie vs. Bowman*, 25 Ore. 364, which permits a mortgagor to remain in possession for the mortgagee, selling and rendering an account of the sales; but that was a far different case from this. In the first place, this mortgage never was recorded, which, in itself, is a prominent piece of vice, and the manner in which the parties conducted themselves under the mortgage cannot be justified upon any ground whatever. Sondheim was in the sole and exclusive possession as the owner; he sold as he pleased; bought as he pleased; rendered no account whatever to the bank, though it was stipulated that he should; the money derived from sales was deposited to his general account in the same bank and checked out by him unrestrained; indeed, the slight protective measure agreed upon aliunde the mortgage, that he should pay on his notes \$500.00 per week, was ignored and finally charged by the bank against his general account, perhaps from moneys received by him from other sources. As I have pointed out, there was not an indication, either off or on the record, by which any person could have been warned that the bank had the remotest claim upon this store, and hence it was, perhaps, that Sondheim was able to secure credit for merchandise running into the thousands of dollars after this mortgage was given. Whether so intended or not, this was a fraud, beyond dispute, and I do not think creditors are, or should be, bound by an arrangement fraught with such entire absence of

candor or open dealing. The effect of it was to conceal from the creditors completely the fact that Sondheim's property was encumbered, to enable him to sell and dispose of it regardless of that fact, and thus to hinder and delay them. To this the bank was a party and must be held to have intended what its attitude accomplished.

The respondent questions the right or power of the Trustee to maintain this suit, it being maintained, in effect, that none of the elements are present to bring the Trustee within the provisions of Section 47a (2), Amendment of 1910, for the reason there were no creditors holding the **leins** or writs there mentioned. I do not think it necessary for the Trustee to plant his case upon this section, but, if it were, the weight of authority is that it is not required there should be in fact creditors with the designated **leins**, but, rather, that the Trustee is deemed to have, and, in very truth, is invested with, the potential rights of such creditors; the intendment is simply that his rights are to be measured by the rules of law applicable in the case of creditors who might have obtained these advantages. This must be so, for, as one authority puts it, "If the operation of the amendment is restricted to cases in which a creditor has in fact acquired a **lein** by legal or equitable proceedings, then it adds nothing to the law as it was under the original act,"

In re Calhoun Supply Co., 26 A. B. R. 528, 189  
Fed. 537.

Independent of this amendment, however, Sec. 67a and 70a (5) are ample to justify this proceeding. Sec. 67a reads:

“Claims which, for want of record, or for other reasons, would not have been valid liens as against the claims of creditors of the bankrupt, shall not be liens against his estate.”

And 70a (5) reads:

“The trustee \* \* \* shall be vested by operation of law with the title of the bankrupt to all \* \* \* (5) property which, prior to the filing of the petition, he could, by any means, have transferred, or which might have been levied upon and sold under judicial process against him.”

A good illustration of the operation of these sections is *Mitchell vs. Mitchell*, 12 A. B. R. 389:

“A trustee in bankruptcy may avoid a mortgage fraudulent under a bankrupt law. The title attempted to be passed by such mortgage vests in such trustee. He stands in the shoes of the bankrupt, but represents the creditors, and is entitled to possession, and may bring an action to enforce his right of possession. He can maintain any action either could maintain. Such an action is not analogous to a creditor's bill, and it is no objection to it that the claims against

the bankrupt are not in judgment. The title is vested in him by operation of law.

“The bankrupt law instead of vesting in the trustee the remedies of the creditors against the property judgment, execution and creditor’s bills (but since amendment of 1910 the trustee does have such rights) vests in him at once the title to the property—makes him the owner.

“It is argued that the mortgage in controversy being good as between the parties is also good as between the mortgagees and trustee in bankruptcy of the mortgagor; but the rule is well settled that the trustee represents the rights of creditors, and may attack conveyances made by the bankrupt in fraud of creditors. It is so provided in the statute. The trustee may prosecute any suit to recover assets in the hands of third parties, or to enforce the payment of claims that could have been prosecuted by the creditors themselves had no proceedings in bankruptcy been instituted.”

and Remington in the recently revised Second Edition of his work on Bankruptcy, at Section 1258, collates and learnedly classifies numerous authorities which he cites in support of the following text:

“Chattel mortgages with power of sale are void as against the trustee if there is no agreement that the proceeds be applied on the debt,

where such mortgages are held void as to creditors by the law of the state.

“The goods which the chattel mortgage thus authorizes the bankrupt to sell must pass to the trustee under Sec. 70 as being property which the bankrupt might have transferred before the bankruptcy.”

In one of these cases, *Standard Tel. Co.*, 19 A. B. R. 491, 157 Fed. 106, the mortgage was similar to the one in suit in that it permitted unrestricted sales, “provided only (2) the interest on the bond is paid; (b) sinking fund amounting to \$500.00 per quarter or \$2000.00 per annum is provided for.”

And Remington again states, at Sec. 1227 $\frac{3}{4}$ :

“Where the state law invalidates the transaction as against any existing creditor, whether armed with process or not, then the trustee will be subrogated to the right of any such existing creditor, regardless of the amendment of 1910 arming him with process.”

These rules, it seems to me, leave no doubt of the Trustee's right to maintain this proceeding.

Finally, it is said that the taking possession by the bank before the filing of the petition cured the infirmities of this mortgage. Counsel must be mistaken, because, under the laws of this state, the mortgage was void *ab initio*. The bank never had a mort-



gage at any time, so far as the creditors of Sondheim are concerned, and, as we have seen, his Trustee has succeeded to their rights in avoiding it. The power of unlimited sale in due course of business, as contained in the document and as asserted and practiced by Sondheim, vitiated the whole transaction. Under such circumstances, taking possession does not operate as a filing of the mortgage, which is the most that can be claimed for that act in any aspect.

In *in re Barker*, 20 A. B. R. 674.

In *in re Reynolds*, 18 A. B. R. 666, 153 Fed. 295.

*Zartman vs. First Nat'l Bank*, 19 A. B. R. 27.

For the foregoing reasons, it is recommended that such order or decree enter herein as will restore to the Trustee the funds representative of the property in controversy.

There is handed up with this report the following documents:

- (1) The petition of the Trustee.
- (2) The answer and amended answer of the bank.
- (3) The restraining order issued.
- (4) The stipulation under which the property was sold and this matter submitted in summary manner.

(5) The testimony taken before the Special Master.

Respectfully submitted, this 16th day of April, 1915.

A. M. CANNON,  
Special Master.

Filed April 19, 1915. G. H. Marsh, Clerk.

And Afterwards, to-wit, on the 19th day of April, 1915, there was duly filed in said Court, and cause, the testimony taken upon the petition of R. L. Sabin, in words and figures as follows, to-wit:

### **TESTIMONY.**

Portland, Oregon, March 23, 1915.

10.00 A. M.

Claim of R. L. Sabin, trustee in bankruptcy, against the Scandinavian-American Bank, a corporation, to certain properties held by it.

Hearing before Honorable A. M. Cannon, special master, under order of reference of the United States District Court, for the district of Oregon.

Present: The Scandinavian-American Bank by its Cashier, Anthon Eckern, and Sidney H. Graham of counsel.

The Trustee was represented by Roscoe C. Nelson and Sidney Teiser.

A statement of the case was presented by Mr. Teiser, orally.

Mr. Graham presented argument and citations in support of the contention of the bank.

The facts were presented by Mr. Nelson, concurred in by Mr. Graham, as follows:

On October 23, 1914, an instrument, copy of which is attached to the answer of the bank and the petition of the Receiver was executed by D. Sondheim and delivered to the bank.

The Scandinavian-American Bank advanced Sondheim \$2600.00 on that date, to-wit: October 23, 1914.

The stock known as the D. M. Pallay stock was at or about that time purchased for the sum of \$5680.00 and the money paid to the seller by D. Sondheim.

That on November 13, 1914, R. L. Sabin, as assignee of several claims against D. Sondheim, caused a writ of attachment to be issues in an action brought by him on that day in the Circuit Court of the State of Oregon for Multnomah County. That an attempt was made to levy on the stock in question but that the same could not be levied because at a previous hour on the same day the agent of D. Sondheim, previously in charge of same, had surrendered the stock to the Scandinavian-American bank.

That D. Sondheim several days prior to November 13, 1914, had left the City of Portland and that his exact whereabouts were unknown to the creditors, and that diligent inquiry as to it to this day has not sufficed to locate said Sondheim's whereabouts.

That on November 14, 1914 a garnishment was

served in the said action on the Scandinavian-American bank to cover the said stock in its possession at that time.

That on November 16, 1914 a petition in involuntary bankruptcy was filed on D. Sondheim, and R. L. Sabin was appointed Receiver in said proceeding, and as such Receiver immediately made claim for said Stock, which claim was refused. That upon the petition of the Receiver an injunction was issued by Judge Wolverton of said Court restraining the transfer or disposition of said stock by the Scandinavian-American bank, without any final determination as to their respective rights, and that by an agreement between the Receiver (who subsequently became Trustee in this matter) and the said bank also without prejudice or any claim or right, the stock after being inventoried in the bankruptcy proceedings at the sum of \$8359.60, was sold by R. L. Sabin for the sum of \$3550.00, and the net proceeds of said sale, after payment of all expenses thereof, amounting to \$3476.70 was deposited in the Scandinavian-American bank also pursuant to stipulation, and a Cashier's check of said bank was issued in favor of R. L. Sabin, Trustee, for the last mentioned sum.

That in this proceeding the said money above named is to be regarded and treated as though it were the stock of goods.

That the said D. Sondheim has been subsequently adjudged a bankrupt and the said R. L. Sabin is now the duly qualified and acting Trustee in bankruptcy.

(Testimony of Anthon Eckern.)

That the Scandinavian-American bank is a corporation engaged in general banking business within the City of Portland, Multnomah County, Oregon.

It was stipulated between the parties present representing the Trustee and the bank that the statement heretofore made by Mr. Nelson and concurred in by Mr. Graham is a true and correct statement of the facts and circumstances underlying the controversy, in addition to the facts admitted to by the pleadings.

ANTHON ECKERN, was called as a witness and duly sworn, and testified as follows:

### **DIRECT EXAMINATION BY MR. GRAHAM.**

Q. What position do you hold with the Scandinavian-American Bank?

A. I am the cashier of the bank.

Q. How long have you been cashier of that bank?

A. Since the bank was organized in 1908.

Q. Please go ahead now and relate to the Court the circumstances attending the execution of this agreement entered into between you for the bank on the one hand, and D. Sondheim on the other.

A. Mr. Sondheim came in in his nervous way and wanted to get \$2600.00 in order to purchase this stock. He said he was short that amount. He further stated that if we would advance him this \$2600.00 he would secure for us very soon the other



(Testimony of Anthon Eckern.)

\$2600.00 that he already owed us, so that the bank would be fully paid. He said he would turn over the whole stock to the bank, the bank could look after it just the same as he did, but that he wanted to handle the stock because he understood that business and we did not. That we could put somebody in the store to look out for it if we wanted to and that the stock would be considered as ours and handled for us.

Q. Did you advance him the sum of money?

A. Yes, upon that agreement made at that time we advanced him \$2600.00 and he purchased the stock and we put in a cashier to look after our interests and the cashier was instructed to report daily sales made in the store.

Q. Was anything said about the title to the stock?

A. Mr. Sondheim said that we would have the title but he wanted to handle the goods, to look after the managing part of it.

Q. And then, after your indebtedness had been paid the rest of the money realized would belong to him?

A. After we were paid \$5200.00 then he would get the title back to the stock and we would have nothing to do with it. That was the understanding.

Q. And so you advanced him \$2600.00 at that time?

A. Yes.

(Testimony of Anthon Eckern.)

Q. What other loans had you made to him prior to that time?

A. At that time he owed us \$2600.00 on three different notes. From time to time we advanced Sondheim money for different purchases and at this particular time he owed us \$2600.00 besides the \$2600.00 advanced him on that day.

Q. Has any part of that indebtedness been repaid—any part of any of the indebtedness he owed you?

A. He paid about \$1000.00. He gave us a check for \$500.00. The understanding was he was to give us \$500.00 every week to save the bank extra bookkeeping if he should turn over to us half the proceeds every day. If he did that it would involve more work and so he agreed to give us a check for \$500.00 every week, and he said if he did not do so on a certain day, on Monday I believe it was, that we were to charge his account with that much. He said we were sure to get it in that way and that arrangement saved us from handling small amounts of money each day. It saved our bookkeepers.

Q. In other words the original agreement provided that he was to deposit one-half the proceeds each day to your credit and that in order to save the bank the extra bookkeeping he agreed to give it to you in a lump sum of \$500.00 each week?

A. Yes.

Q. Is this payment of \$500.00 credited to his account?

(Testimony of Anthon Eckern.)

A. Yes, it has been endorsed on his notes.

Q. On what indebtedness has it been applied, the old or the new?

A. Applied on the old indebtedness.

Q. What other payments have been credited on his account?

A. Well, \$365.00 was credited.

Q. How did that arise?

A. We charged his account with \$365.00 on November 12, and \$195.00 on November 13.

Q. Did you have any understanding by which you could charge his account if he failed to make certain payments?

A. Yes, that was the understanding. If he was not there to pay on a certain day, as I stated before, we could charge his account.

Q. Your bank was the general depository for all funds he received from sales conducted by him at his various stores, were you not?

A. Yes.

Q. What sums of cash did you realize from the management of the store from the time you took possession on November 13, until it was closed up by order of the Federal Court, on November 23.

No answer.

MR. CANNON. Q. How much did you get in the ten days between November 13, and 23,—what cash was taken in that you got?

A. \$1000.43.

(Testimony of Anthon Eckern.)

Q. Is that after deducting all expenses?

A. Yes.

Q. What expenses did you have?

A. Salary for the boys in the store and some small miscellaneous expenses, making a total of \$145.75.

Q. Does that \$145.75 include all the expenses that you incurred?

A. All except the salary of the manager, Mr. Julius Efteland.

Q. He got \$36.40 out of this \$145.75 and is entitled to more than that for the ten days, is he not?

A. Yes.

Q. What then, Mr. Eckern, is the total gross receipts that you received from the sale of goods in the Pallay store from November 13, 1914, up to and including the time the store was closed by the restraining order of the Federal Court?

A. \$1146.18.

Q. And out of that you paid what sum for expenses?

A. \$145.75.

Q. And there is still owing what amount for services rendered during that time?

A. We still owe Mr. Efteland for ten days services.

Q. And he has received on account of that how much?

A. \$36.40.

(Testimony of Anthon Eckern.)

Q. State whether or not you had possession of this stock of goods at the time the attempted levy was made?

A. We had.

Q. When did you take possession of the stock of goods, under what circumstances, and why?

A. The why is that we were trying to find Sondheim, trying to get hold of him so he could pay us that deficiency. It was claimed that he was up to Seattle or Tacoma, and we heard he was sick up there, but we could not get any reply from him. Mr. Nelson went over there and we couldn't hear from him. He was over there three days before we heard from him, so we decided that we had better put our own man in there in charge until Sondheim returned. We put a man in to represent us, to open up the store in the morning and stay there all day and lock it up at night.

Q. Were these loans made to Mr. Sondheim in good faith?

A. Yes.

Q. Did you have any intention of concealing anything or hindering, delaying or defrauding any of the creditors?

A. We did not.

Q. Was anything said about hindering or delaying any of the creditors at the time these loans were made?

A. No.

Q. Did you know whether this last loan made on



(Testimony of Anthon Eckern.)

October 23, 1914, was used for the purpose of this stock of goods—the \$2600.00 loan?

A. Yes, it was.

Q. Did you ever conceal from any of the creditors the fact that you claimed the ownership of the store until this sum was paid.

Question repeated.

Q. The sum of \$5200.00?

A. No, we never concealed it, but we were never asked the question to my recollection. .

MR. GRAHAM: I would like at this time for the purpose of showing when this claim against Mr. Sondheim arose to have introduced the schedule or claim of the respective claimants.

It is stipulated by and between the attorneys for the bank and for the Trustee that either side may present and file a tabulation from the claims proven in the bankruptcy proceeding of D. Sondheim with reference to the dates on which the indebtedness was contracted by Mr. Sondheim for purchases.

### **CROSS-EXAMINATION BY MR. NELSON.**

Q. Did you bring the Sondheim notes with you?

A. I have copies of them.

Q. Do you know that these copies of the notes and the endorsements thereon are correct—did you make them yourself?

A. No, they were handed to me this morning by the bookkeeper.

(Testimony of Anthon Eckern.)

Q. And you instructed him to make the copies as well as the endorsements?

A. Yes.

Q. Do you know in whose hand-writing the endorsements were made on the original notes?

A. The note teller, I am sure. Mr. Vogel.

Q. When a payment is made on a note at your bank—when a party has two or three notes outstanding—is it your system to enter the amount paid on your ledger, or do you give him credit on any particular note for the particular amount paid?

A. I do not catch your meaning.

Q. My question is this. Take an instance like that of D. Sondheim in which he owed you money on four notes. Now, if a payment is made by D. Sondheim of \$500.00, do you on your books credit that sum to his account or do you give him credit for it on any particular note.

A. No, we credited it on some particular note.

Q. Do your accounts in your ledger show the particular notes?

A. Yes.

Q. How do you do that, do you keep a separate page for each note?

A. Yes.

Q. And the account is kept in that way?

A. Yes.

Q. Did Sondheim give you any instruction as to the application of the payments when he made these payments to you?

(Testimony of Anthon Eckern.)

A. Did he give me any instructions as to what note to apply it on?

Q. Yes.

A. No he did not.

Q. Who made the application?

A. We did.

Q. You, or the other gentlemen whose name you mentioned a few moments ago?

A. I instructed him and he made the application.

Q. What instructions did you give him?

A. To apply it on the note specified.

Q. How did you pick out the particular note, did you consult your books to find out which note to apply it on?

A. No, I knew the notes by heart, which note to apply it on.

Q. Then you would tell your clerk to apply the payment on the \$2000.00 note or the \$800.00 note, or whichever it was?

A. Yes.

Q. You were not particularly concerned with the dates of the notes?

A. No.

Q. It was simply an arbitrary instruction on your part?

A. Yes, because we expected to get all these notes cleared up in a very short time and we did not pay much attention to the matter.

Q. When you made this loan of \$2600.00 to him

(Testimony of Anthon Eckern.)

you took his note for \$2600.00 payable on demand?

A. Yes.

Q. It had been your custom previously to take notes payable on demand, had it?

A. Yes.

Q. Did you advance him the \$2600.00 on the same day you took the note from him?

A. I think we did. He got credit for it on that day.

Q. You passed credit to him on your books so he could check on it.

A. Yes. It may be that the transaction was after banking hours.

Q. You charged interest from the date the note bears?

A. Yes.

Q. And this agreement, was it executed the date it bears?

A. Yes.

Q. The note of which you handed me a copy is dated the 22nd of October and the agreement is the 23rd?

A. Yes. He made provision to get the money the day before he got it, and he drew up the agreement on that day. We could not get hold of any attorney on that day, as I remember it now, it was late in the evening, after it was too late to get an attorney to draw it up and so we waited until the next day.

Q. Do I understand, on the day of that agree-

(Testimony of Anthon Eckern.)

ment you gave him credit for the \$2600?

A. That is my recollection.

Q. The interest charged is 8%?

A. Yes.

Q. Now, from whom did Sondheim purchase this stock of goods? The stock in controversy on 6th street?

A. I understood he purchased it from Mr. Sabin.

Q. In the bankrupt proceedings of D. Pally & Company?

A. Yes.

Q. Did you have any conversation with the seller of the stock of goods?

A. No.

Q. You did not get any bill of sale from the seller, or anything of that sort, did you?

A. No.

Q. You knew the stock was being turned over to Sondheim by whoever was selling it?

A. Our understanding was that the stock would be in our name, that we would own title to it until we were paid.

Q. Did you take a bill of sale from the seller or do anything to get the title?

A. No.

Q. You understood that was the effect of this agreement which you had with Sondheim?

A. Yes.

Q. You had no agreement with the seller of the stock?



(Testimony of Anthon Eckern.)

A. No.

Q. You knew that Sondheim was paying considerable more than \$2600 for the goods, didn't you?

A. Yes.

Q. Did he tell you what he was paying?

A. I think he did.

Q. About \$6000?

A. I think so.

Q. Did you investigate the stock to see whether it was worth what he said he was paying for it?

A. No.

Q. The bank didn't put its name on the store, or anything of that character, did it?

A. No.

Q. Sondheim ran the business just like he ran his other stores, did he?

A. Yes.

Q. He deposited the proceeds in his own name in your bank from his sales from day to day?

A. Yes.

Q. And he deposited money taken in at the other stores he owned in your bank?

A. Yes.

Q. As a matter of fact, you did not require him to pay one-half of his receipts each day, did you, but I understood that you had an arrangement by which he was to pay you \$500 each week, and that if he failed to do so you were to charge that amount to his account and apply the amount on his notes held by you?

(Testimony of Anthon Eckern.)

A. Yes.

Q. Sondheim could check on his account at your bank, could he?

A. Yes.

Q. And he did check on it from time to time?

A. Yes.

Q. Did you or did you not know it to be a fact that he made new purchases of goods and installed them in this store with the goods purchased from the Pallay estate after he made the original purchase?

A. We did not keep any close check on that.

Q. You knew, he did buy some additional stock, did you not?

A. I presume he did, yes.

Q. Now, as I understand you, you put your man in there on the 13th day of November, 1914?

A. Yes.

Q. Who did you say it was you put in there in charge?

A. Julius Efteland.

Q. What had been his previous business to that time?

A. He bought and sold bankruptcy goods. He had a store on the east side of the river. He was engaged in different lines of business.

Q. Who was in charge before Mr. Efteland?

A. Sondheim was in charge.

Q. But he was out of the city a great deal?

A. Yes, he was out of the city and when he was,

(Testimony of Anthon Eckern.)

he left it in charge of his clerks; he left his clerks there to look out for it.

Q. Just what particular thing, if anything, happened on November 13th to cause you to get hold of Mr. Efteland and send him in there to take charge of the place?

A. Because Sondheim could not be found, and he had not made the payments as he promised and we got kind of uneasy. It was reported that he was sick in Tacoma or Seattle, and we did not know how sick or what would happen; his stores wired they did not know where he was and we could find out nothing about him; we tried to get him on the telephone but could not; could not get in touch with him at all or find out anything about him, and we concluded, if he was going to be sick over there for an indefinite period, it was better for us to protect our interests, and the best thing for us to do was to put a man in charge there, and so we did that.

Q. You had made some unsuccessful attempts to locate him in Tacoma and Seattle?

A. Yes.

Q. Had you not received a telephone message from a bank in Salem calling you attention to what was practically a criminal act on the part of Mr. Sondheim?

A. Not to my recollection we had not. I remember, we heard something about a loan of \$1500 he made in Salem, but I do not recollect the nature of it.

(Testimony of Anthon Eckern.)

Q. Do you remember whether that was after or before you took charge of this place?

A. I don't remember.

Q. Had you asked this man Nelson, whom you mentioned a while ago, to try to find Sondheim in Tacoma or Seattle?

A. Yes, he went up there for that purpose.

Q. You knew he was going up there for that purpose?

A. I knew he was going up for that purpose.

Q. And you expected to get a report from him if he could find Sondheim?

A. Yes.

Q. But you heard nothing from him?

A. We did not hear anything from him.

Q. While ago when I was trying to make a statement of the facts, I made the statement that you had taken charge of the place on the 13th of November and was interrupted with the correction that someone from that place came up and surrendered the stock to you, not that you took possession; who was it surrendered that stock to you on that day; what was the reason for that correction?

A. We talked with Nudleman, the man who had charge of the store before we attempted to do this and he said to us that we could take charge of it at any time we desired.

Q. Did he tell you why?

A. He knew that money was coming to us, that Sondheim owed us money on the stock and when we

(Testimony of Anthon Eckern.)

said that we thought it best to take possession ourselves he made no objection, in fact he said he knew we had a right to take it.

Q. And you sent your man over there on the 13th and took charge?

A. Yes.

Q. Did you pay this man Efteland a salary?

A. No, we have not paid him anything ourselves.

Q. But you are responsible for his employment are you not?

A. Yes, we employed him.

Q. He was the first man whom the bank had employed there?

A. Subject to Sondheim—he was our representative—Efteland.

Q. The bank was not paying the salary of any employes there during the time before Sondheim left?

A. No.

Q. And the bank was not making any purchases of new goods or anything of that character?

A. No.

Q. Did Sondheim make a regular report to you of the new goods he bought?

A. No, he did not.

Q. Did you watch Sondheim's checks of the proceeds of sales there to see what he was doing with the money?

A. Not closely, no.



(Testimony of Anthon Eckern.)

Q. He just continued to check as he had always done before?

A. Yes.

Q. Except that you got this \$500.00?

A. Yes.

**RE-DIRECT EXAMINATION BY  
MR. GRAHAM.**

Q. You were asked in your cross-examination concerning the wages due Mr. Efteland for services. Isn't it a fact that out of this \$145.75, which is charged by you for expenses out of the proceeds realized for the sale of goods from the Pallay stock while you were conducting the sale, that Mr. Efteland received some money.

A. Yes, he took \$36.40 from the store and we charged it to his account and put it in the expenses.

Counsel for bank introduced in evidence copies of the four notes signed by D. Sondheim, and the same were respectively marked "Respondent's Exhibit One," "Respondent's Exhibit Two," "Respondent's Exhibit Three," and "Respondent's Exhibit Four."

Q. You were also asked, Mr. Eckern, concerning the additional merchandise that was placed in the store, and inquiry was made of you whether or not Mr. Sondheim had furnished you any record of these additional purchases. Do you know whether or not any new merchandise was placed in the store, and if so what merchandise?

(Testimony of Anthon Eckern.)

A. He bought from three different parties. Fleischner, Mayer & Company, \$76.80. N. & S. Weinstein, \$33.00. Baron Phillips, \$316.26.

Q. Where did you secure this information?

A. I secured it from his books.

MR. GRAHAM: I wish to make a statement at this time with reference to these notes, so there may be no misunderstanding. The credits on the notes were made here recently under my direction and the application made on the old indebtedness rather than on the new. I understood from the bank officials that no direction was given them as to the application of the payments and that the credit was first made on the new note, but I directed them that they had a right and so advised them, to make application of the payment on the old indebtedness, and the change was made. I want the record to show that, so there will be no question about it later on. That was done since the petition was filed by the Trustee asking for the possession of the stock. I am making this statement so no incorrect ideas can be assumed later on.

MR. NELSON: We appreciate very much the fairness of counsel in that respect and in respect to this whole controversy. But I would like to ask whether the credit was originally made on the \$2600.00 note?

MR. GRAHAM: Yes, I mean the note that was

(Testimony of Anthon Eckern.)

given October 22 to cover the advance that was used for the purchase of this stock, but I advised the bank officials that they had the right to make application of these sums received then either on the new or on the old indebtedness and I suggested that the change be made from the new indebtedness, where they had credited it, to the older indebtedness, inasmuch as they had received no instructions from Mr. Sondheim as to how he desired the credits to be made.

MR. NELSON: I would like to see the original notes.

MR. GRAHAM: Certainly, we will bring them over if you desire us to do so at any time you want them.

MR. CANNON: Q. What is the total sum now due your institution, Mr. Eckern?

A. \$1000.43.

Q. I think, you don't understand me. What I want to know is the total sum now due your bank from Sondheim after giving him these credits?

A. Oh, I did not understand you. The amount is \$4140.00.

Q. What credits does that include?

A. The credits on the notes and not accounting for the \$1000.43.

It is stipulated between the parties that the payment of \$500.00 made by Mr. Sondheim by check,

and likewise the items of \$365.00 and \$195.00 charged to his account, were first credited on the note dated October 22, 1914, for \$2600.00. That thereafter and subsequent to the filing of the petition, upon the direction of the attorney for the bank, a change was made of the credits to the old account and notes, and that Exhibits 1, 2, 3, and 4, in so far as the endorsements are concerned, represent the condition of the original notes at the present time since the changes referred to by counsel for the bank were made.

Filed April 19, 1915.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 26th day of April, 1915, there was duly filed in said Court, and cause, Exceptions to the Report of Special Master, in words and figures as follows, to-wit:

### **EXCEPTIONS.**

Comes now the Scandinavian-American Bank, by its attorney, Sidney J. Graham, and files and enters herein the following exceptions to the report of the Special Master upon the petition of the receiver to require it to turn over certain property or the proceeds thereof to the bankrupt estate:

#### **I.**

Respondent excepts to the failure of the Special

Master to set out all the facts as developed at the hearing held before said Special Master.

## II.

Respondent excepts to the conclusion of the Special Master that the agreement in controversy does not constitute a trust receipt.

## III.

Respondent excepts to the conclusion of the Special Master that the instrument is void under the laws of the State of Oregon and under the decision of the Circuit Court of Appeals for this district.

## IV.

Respondent excepts to the conclusion of the Special Master that the Trustee has jurisdiction to maintain this proceeding.

## V.

Respondent excepts to the conclusion of the Special Master that a decree should be entered restoring to the Trustee the property or the funds representative of the property in controversy.

SIDNEY J. GRAHAM,  
Attorney for Scandinavian-American Bank.



STATE OF OREGON,        }  
County of Multnomah, } ss.

Due service of the within exceptions is hereby accepted in Multnomah County, Oregon, this 26th day of April, 1915, by receiving a copy thereof, duly certified to as such by S. J. Graham, attorney for Bank.

**SIDNEY TEISER,**  
of Attorneys for Trustee.

Filed April 26, 1915.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 17th day of May, 1915, there was duly filed in said Court, and cause, an Order on Exceptions to report of Special Master, said order being also Exhibit A attached to the petition for revision, in words and figures as follows, to-wit:

**ORDER ON EXCEPTIONS TO REPORT OF  
SPECIAL MASTER.**

This cause was heard upon the exceptions of the Scandinavian-American Bank to the report of Mr. A. M. Cannon, Special Master herein, upon the petition of the receiver to require said Scandinavian-American Bank to turn over certain property or the proceeds thereof to the Bankrupt Estate, and was ar-

gued by Mr. Sidney J. Graham of Counsel for said Scandinavian-American Bank and by Mr. Sidney Teiser of counsel for the trustee of said bankrupt. On consideration whereof it is ordered that said exceptions be and the same are hereby overruled; that the report of the Special Master be, and the same is hereby affirmed, and that the Scandinavian-American Bank be, and it is hereby ordered and directed to turn over to the Trustee herein the property or proceeds thereof as prayed for in the petition of said Trustee.

Witness the Honorable Robert S. Bean, Judge of said Court, and the seal thereof at Portland in said District, this 17th day of May, 1915.

(Seal)

G. H. MARSH, Clerk.

Filed March 17, 1915.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 21st day of May, 1915, there was duly filed in said Court, and cause, a decree on the petition of R. L. Sabin, said decree being also Exhibit B attached to the petition for revision, in words and figures as follows, to-wit:

### **DECREE.**

BEFORE HONORABLE R. S. BEAN, JUDGE  
OF THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF OREGON:

This cause came on this day to be heard upon the exceptions to the report of the Special Master herein filed by the Scandinavian-American Bank, and it appearing to the court that a petition requiring the Scandinavian-American Bank to turn over certain property belonging to the alleged bankrupt was filed herein by the receiver, prior to the election of the trustee, and

It further appearing that at the time said petition was filed the Scandinavian-American Bank was claiming certain property and the proceeds of certain property sold, possession of which was taken by them under a certain instrument entered into between said Scandinavian-American Bank and D. Sondheim, copy of which was attached to said petition of the receiver filed herein,

And it further appearing that the said Scandinavian-American Bank answered said petition and contested the right of the receiver therein, and maintained its right to the property held by it under said instrument,

And it further appearing that said Scandinavian-American Bank for a period of about ten days conducted a sale at retail of the property held by it under said instrument, and was then enjoined from further disposing of said property by this Court.

And it further appearing that a stipulation was entered into between said Scandinavian-American Bank and said receiver whereby an inventory was

to be taken of the property on hand at the time of said stipulation, and the property sold by said receiver, and the money realized from the sale thereof, less the expenses of sale, should be held by said receiver and deposited in said Scandinavian-American Bank subject to the rights of said parties to the property in question, as should thereafter be determined by this Court, upon which stipulation an order was entered pursuant thereto.

And it further appearing that pursuant to said stipulation and order the receiver sold said property with the approval of said Court, and realized therefrom, after deducting the expenses of sale, the sum of \$3476.70, which sum is now held on deposit in said Scandinavian-American Bank as stipulated.

And it further appearing that during the ten days that the Scandinavian-American Bank was in possession of said property and making sale thereof, it realized the net sum of \$1000.43, subject to a claim of one Julius Efteland for ten days' services, less the sum of \$36.40 paid to said Julius Efteland.

And it further appearing that the Scandinavian-American Bank in its answer filed herein objected to the jurisdiction of the Court to pass upon the questions at issue,

And it further appearing that the Scandinavian-American Bank subsequently filed an amended answer waiving the objection to the jurisdiction of

the Court herein to try the matter summarily, and that said Scandinavian-American Bank and said receiver stipulated in open court, through their respective attorneys, that the trustee elected by the creditors in said bankruptcy cause have authority to proceed in the matter in place of said receiver without further order of the Court, and further stipulated that the matter be referred to A. M. Cannon, Esquire, as Special Master, to hear the parties therein and take such evidence as might be desired to be introduced, as to the rights of the parties to the property or its proceeds therein, and to report his findings to the Court.

And it further appearing that an order of this Court was made pursuant to said stipulation, and that R. L. Sabin, Trustee, did proceed herein against said Scandinavian-American Bank as aforesaid, and that said matter was duly referred to said A. M. Cannon, as Special Master, for the taking of testimony and evidence and for a report with his recommendations and findings therein,

And it further appearing that said A. M. Cannon, Special Master, duly took said evidence and made and filed his findings and recommendations herein, wherein he recommended that such order or decree be entered by this Court as would restore to the trustee the funds representative of the property in controversy,

And it further appearing that the Scandinavian-



American Bank has duly excepted to the report and recommendations of said Special Master herein, and that the matter was duly heard by this Court upon said exceptions and was argued by counsel for the respective parties, and the Court having fully considered the matter, now therefore,

IT IS ADJUDGED, ORDERED, AND  
DECREEED

that the exceptions to the Special Master's report be, and the same hereby are overruled.

AND IT IS FURTHER ADJUDGED,  
ORDERED, AND DECREEED

that the Scandinavian-American Bank pay unto R. L. Sabin, trustee, herein, upon surrender of the cashier's check held by him in the amount of \$3476.70, the said sum of \$3476.70, and the further sum of \$1000.43, said latter amount being the net proceeds of sale realized by the Scandinavian-American Bank from the sale of property by it prior to the injunction order of this court and the taking possession by said R. L. Sabin of said property under said stipulation and order heretofore mentioned.

AND IT IS FURTHER ADJUDGED,  
ORDERED, AND DECREEED

that the amount due by said Scandinavian-American Bank to Julius Efteland for ten days' services, as

set forth herein, less the amount of \$36.40 paid him by said bank, be, and the same is hereby a lien upon the funds in the hands of the trustee herein, and said trustee is directed to pay to the said Julius Efteland the amount due him by said bank.

**AND IT IS FURTHER ADJUDGED,  
ORDERED, AND DECREED**

that said Scandinavian-American Bank pay unto said R. L. Sabin, trustee, interest at the rate of 6% per annum from the date of this decree, upon said moneys, together with costs and disbursements herein.

Dated this 21st day of May, 1915.

(Signed) ROBERT S. BEAN,  
Judge.

Filed May 21, 1915. G. H. MARSH, Clerk.

And afterwards, to-wit, on the 1st day of June, 1915, there was duly filed in said Court, and cause, an Opinion, in words and figures as follows, to-wit:

**OPINION.**

in the matter of D. Sondheim, bankrupt, submitted on motion to review the action of the referee in bankruptcy in disallowing the claim of the Scandinavian-American Bank for a preference.

It appears from the undisputed evidence in the case that in October, 1914, Sondheim was engaged

in the general merchandise business in the City of Portland, Oregon, and elsewhere, buying and selling bankrupt stocks; that on October 22, he applied to the Scandinavian Bank for a loan of \$2600.00 to enable him to purchase a stock of goods then offered for sale by the trustee in bankruptcy. At that time he was indebted to the bank for a note for \$2600.00. The bank advanced the money with which, and some of his own funds, he purchased this bankrupt stock, paying about \$5680.00 for it. At the time the money was advanced, he executed to the bank a written instrument reciting that the \$2600.00 was to be used in the purchase of this stock of goods, that he should hold the title to it in trust for the bank as far as necessary to protect it, that the bank should have the privilege of putting a cashier in charge of these goods to keep an account of the sales, and that the bankrupt should pay over to the bank each day one-half the proceeds of the sales. This latter clause was not observed, but Sondheim bought the stock of goods, assumed the control of it, sold and disposed of it in the regular course of the business, deposited the proceeds to his individual account in this bank and checked them out as he saw proper. The arrangement about the proceeds was changed by mutual agreement, so that Sondheim agreed to pay to the bank on this \$2600.00 claim \$500.00 a week, and he did that for one or two weeks, but thereafter failed to do so.

This instrument was never recorded. Thereafter Sondheim took advantage of the bankrupt act and it

is now claimed by the bank that it is entitled to a preference or preferred lien upon this stock of goods for the \$2600.00 advanced on it.

There are two grounds urged by the bank in support of this contention. The first is that Sondheim stood to it in place of a trustee, held the goods in legal effect as a trustee for the bank, but the difficulty with that position is that the bank never owned these goods or never purchased them; it simply loaned to Sondheim \$2600.00, with which he might purchase. He took the title in his own name, proceeded to sell and dispose of the goods in the regular course of business, and therefore was not in any sense the holder of the title in this case as trustee for the bank.

Then again it is urged that this instrument is valid because the referee found, and it is no doubt true, that the transaction was entered into in perfect good faith by the bank, but as I understand the decisions of the Oregon courts, a mortgage on a shifting stock of goods where the mortgagor is permitted to remain in possession and sell and dispose of it in the regular course of business, appropriate to his own use, or use as he may see proper, is void as to creditors, and therefore this instrument, I take it, is a void instrument and did not give the bank any preference over the other creditors of this concern.

It is also claimed the trustee in bankruptcy is not in position to question the validity of this instru-



ment. Prior to the amendment of 1910, to the bankruptcy act the Trustee was not clothed with the privilege of a judgment creditor, but to obviate this condition the amendment of 1910 was adopted, which was intended to vest in the Trustee the same rights to attack secret unrecorded liens which were void under the state statute as was given to a judgment creditor under the state law. And under that provision of the bankruptcy act I take it that the trustee in bankruptcy is in position to question the validity of this mortgage, which was void from the beginning, and therefore the decision of the referee in bankruptcy will be affirmed.

Filed June 1, 1915.      G. H. Marsh, Clerk.

And to-wit, on the 26th day of May, 1915, there was duly filed in said Court, and cause, a Petition for Appeal, in words and figures as follows, to-wit:

### **PETITION FOR APPEAL.**

The above entitled bank, conceiving itself aggrieved by the order and decree made and entered on the 17th day of May, 1915, in the above entitled Court and cause, and the subsequent order and decree made and entered on the 21st day of May, 1915, in the above entitled Court and cause, does hereby appeal from such orders and decrees to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the assignment



of errors which is filed herewith and the said banking corporation prays that this appeal may be allowed and that a transcript of the records, proceedings and papers upon which such orders and decrees were made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

SIDNEY J. GRAHAM,  
Attorney for Scandinavian-American Bank.

The foregoing claim of appeal is allowed on this 26th day of May, 1915, and is to operate as a supersedeas of the orders and decrees complained of upon the execution of a satisfactory bond in the sum of \$5000.00.

Dated May 26, 1915.

CHAS. E. WOLVERTON,  
District Judge.

STATE OF OREGON,      }  
County of Multnomah, } ss.

Due service of the within petition for Appeal is hereby accepted in Multnomah County, Oregon, this 26th day of May, 1915, by receiving a copy thereof, duly certified to as such by Sidney J. Graham, attorney for Scandinavian-American Bank, a corporation.

SIDNEY TEISER,  
Attorney for R. L. Sabin, Trustee.

Filed May 26, 1915.      G. H. MARSH, Clerk.

And afterwards, to-wit, on the 26th day of May, 1915, there was duly filed in said Court, and cause an Assignment of Errors, in words and figures as follows, to-wit:

### **ASSIGNMENT OF ERRORS.**

The Scandinavian-American Bank assigns the following as the errors upon which it will rely upon its appeal from the orders and decrees made and entered in the above entitled Court and cause on the 17th day of May, 1915, and the 31st day of May, 1915.

Said bank believes and alleges said orders and decrees to have been erroneous in that:

1. The Court overruled its exceptions to the Special Master's report.

2. The Court failed to sustain its exceptions to the Special Master's report.

3. The Court confirmed the report of the Special Master and further ordered that this bank pay to the Trustee the sum of \$1000.43, and the costs and disbursements of the proceeding.

4. The Court confirmed the report of the Special Master, holding the agreement in controversy did not amount to a contract of conditional sale, or a trust receipt.

5. The Court confirmed the report of the Special Master, holding the agreement in controversy void as a chattel mortgage under the laws of the State of Oregon.

6. The Court confirmed the report of the Special Master, holding that the possession of the property by this bank prior to a levy by any creditor and prior to the filing of the petition in involuntary bankruptcy did not entitle this bank to hold said goods until its indebtedness was repaid.

7. The Court confirmed the report of the Special Master, holding that the Trustee could question this conveyance.

The Court made and entered the following orders and decrees:

“This cause was heard upon the exceptions of the Scandinavian-American Bank to the report of Mr. A. M. Cannon, Special Master herein, upon the petition of the receiver to require said Scandinavian-American Bank to turn over certain property or the proceeds thereof to the bankrupt estate, and was argued by Mr. Sidney J. Graham of counsel for said Scandinavian-American Bank and by Mr. Sidney Teiser, of Counsel for the Trustee of said bankrupt. On consideration whereof it is ordered that said exceptions be and the same are hereby overruled; that the report of the Special

Master be, and the same is hereby affirmed, and that the Scandinavian-American Bank be, and it is hereby ordered and directed to turn over to the Trustee herein, the property or proceeds thereof as prayed for in the petition of said Trustee."

And on the 21st day of May, 1915, omitting certain recitals therein, the following order and decree:

"IT IS ADJUDGED, ORDERED, AND DECREED, that the exceptions to the Special Master's report be, and the same hereby are overruled.

AND IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that the Scandinavian-American Bank pay unto R. L. Sabin, trustee herein, upon surrender of the cashier's check held by him in the amount of \$3476.70, the said sum of \$3476.70, and the further sum of \$1000.43, said latter amount being the net proceeds of sale realized by the Scandinavian-American Bank from the sale of property by it prior to the injunction order of this Court and the taking possession by said R. L. Sabin of said property under said stipulation and order heretofore mentioned.

AND IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that the amount due by said Scandinavian-American Bank to

Julius Efteland for ten days' services, as set forth herein, less the amount of \$36.40 paid him by said bank, be, and the same is hereby a lien upon the funds in the hands of the trustee herein, and said trustee is directed to pay to the said Julius Efteland the amount due him by said bank.

AND IT IS FURTHER ADJUDGED, ORDERED AND DECREED that said Scandinavian-American Bank pay unto said R. L. Sabin, trustee, interest at the rate of 6% per annum from the date of this decree, upon said moneys, together with costs and disbursements herein."

WHEREFORE, the Scandinavian-American Bank prays that the Court allow the appeal from said orders and decrees, and that the same be reversed and that said Court be directed to enter an order and decree herein sustaining its exceptions to the Special Master's report and confirming its possession of said property, and for such other and further relief as may be proper.

SIDNEY J. GRAHAM,  
Attorney for Appellant.

STATE OF OREGON,     }  
County of Multnomah, } ss.

Due service of the within Assignment of Errors on Appeal is hereby accepted in Multnomah County, Oregon, this 26th day of May, 1915, by receiving a



copy thereof, duly certified to as such by Sidney J. Graham, attorney for Scandinavian-American Bank.

SIDNEY TEISER,  
Attorney for R. L. Sabin, Trustee.

Filed May 26, 1915.      G. H. MARSH, Clerk.

And afterwards, to-wit, on the 26th day of May, 1915, there was duly filed in said Court, and cause, a Bond on Appeal, in words and figures as follows, to-wit:

### **BOND ON APPEAL.**

KNOW ALL MEN BY THESE PRESENTS, THAT WHEREAS, on the 17th day of May, 1915, on the 21st day of May, 1915, at a District Court of the United States for the District of Oregon, in a proceeding pending in said Court between R. L. Sabin, trustee of the estate of D. Sondheim, bankrupt, as petitioner, and the Scandinavian-American Bank, a corporation, orders and decrees were made and entered against said Scandinavian-American Bank overruling its exceptions to the report of the Special Master, in which he recommended that an order or decree be entered restoring to the Trustee the funds representative of the property in controversy, and confirming the report of the Special Master and further providing that the sum of \$1000.43 realized by said bank from sales of said merchandise prior to the filing of the petition in

bankruptcy and the costs and disbursements of the proceeding be paid to said Trustee.

And, WHEREAS, said Scandiniavian-American Bank has obtained an appeal and filed a copy thereof in the clerk's office of this Court to reverse said orders and decrees and a citation directed to said R. L. Sabin, trustee of the estate of D. Sondheim, bankrupt, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in said Circuit, within thirty days hereof.

NOW THEREFORE, in consideration of the premises, we, the Scandinavian-American Bank, a corporation, as principal, and C. F. Henderson, as surety, are held and firmly bound to said R. L. Sabin, trustee of the estate of D. Sondheim, bankrupt, in the full and just sum of \$5000.00, to be paid to said R. L. Sabin, his executors, administrators, successors, and assigns, and to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

The condition of the above obligation is such, however, that if said Scandinavian-American Bank shall prosecute its appeal to effect and answer the damages and costs, and pay the sums provided for in the orders complained of, if it fail to make its plea good, then the said above obligation shall be void, otherwise, to remain in full force and effect.

WITNESS our hands and seals this 26th day of May, 1915.

(Corporate Seal)

SCANDINAVIAN AMERICAN BANK.

By ANTON ECKERN, Cashier.

C. F. HENDRICKSEN (Seal)

Approved by

CHAS. E. WOLVERTON,

District Judge.

STATE OF OREGON,    }  
County of Multnomah, } ss.

I, C. F. Hendricksen, whose name is subscribed to the within undertaking as surety, being first duly sworn, depose and say: That I am a resident and householder within the State of Oregon, and am not a counsellor or attorney at law, sheriff, clerk or other officer of any Court, and am worth the sum of Ten Thousand Dollars over and above all debts and liabilities, and exclusive of property exempt from execution.

C. F. HENDRICKSEN.

Subscribed and sworn to before me this 26th day of May, 1915.

(Seal)

A. L. MORLAND,  
Notary Public for Oregon.

STATE OF OREGON,        }  
County of Multnomah, } ss.

Due service of the within Bond on Appeal is hereby accepted in Multnomah County, Oregon, this 26th day of May, 1915, by receiving a copy thereof, duly certified to as such by Sidney J. Graham, attorney for the Scandinavian-American Bank.

SIDNEY TEISER,  
Attorney for R. L. Sabin, Trustee.

Filed May 26, 1915.     G. H. MARSH, Clerk.

And afterwards, to-wit, on the 26th day of May, 1915, there was duly filed in said court and cause a Stipulation to Combine Petition for Revision and Appeal in words and figures as follows, to-wit:

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that inasmuch as counsel for Scandinavian-American Bank are uncertain whether the proper procedure on review is by petition or by an appeal, that the petition to review the order of the District Court and the appeal therefrom may be heard simultaneously and upon a single printed record, and that such record shall be deemed and be taken as and for a record in both the proceedings by petition for

review and on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 26th day of May, 1915.

SIDNEY TEISER,

Attorney for R. L. Sabin, Trustee.

SIDNEY J. GRAHAM,

Attorney for Scandinavian-American Bank.

Filed May 26th, 1915. G. H. MARSH, Clerk.

And afterwards, to-wit, on the 26th day of May, 1915, there was duly filed in said Court, and cause, a Praeipe for Transcript, in words and figures as follows, to-wit:

### **PRAEIPCE FOR TRANSCRIPT.**

To G. H. MARSH, Esq., Clerk of the District Court:

Please prepare, certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit, copies of:

Petition of receiver.

Stipulation to sell property.

Order upon said stipulation.

Amended answer of bank.

Order of reference.

Report of Special Master, and evidence and exhibits attached thereto.

Exceptions of Scandinavian-American Bank to report of Special Master.



Opinion of the Court.

Order of May 17, 1915, overruling exceptions.

Subsequent order and decree of May 21, 1915.

Petition for appeal.

Bond on appeal.

Assignment of errors.

Citation on appeal.

Stipulation.

This praecipe.

Dated at Portland, Oregon, this 26th day of May,  
1915.

SIDNEY J. GRAHAM,

Attorney for Scandinavian-American Bank.

STATE OF OREGON,     }  
County of Multnomah, } ss.

Due service of the within praecipe is hereby  
accepted in Multnomah County, Oregon, this 26th  
day of May, 1915, by receiving a copy thereof, duly  
certified to as such by Sidney J. Graham, attorney  
for Scandinavian-American Bank,

SIDNEY TEISER,

Attorney for R. L. Sabin, Trustee.

Filed May 26, 1915.     G. H. MARSH, Clerk.

UNITED STATES OF AMERICA, }  
District of Oregon, } ss.

I, G. H. Marsh, clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on review of, and on appeal from, the Order and Decree of the District Court of the United States for the District of Oregon, in the proceeding in said Court in the matter of D. Sondheim, bankrupt, between R. L. Sabin, trustee of the estate of said D. Sondheim, bankrupt, and the Scandinavian-American Bank, in accordance with law and the rules of this Court, and in accordance with the praecipe of the appellant and the stipulation of the parties filed in said cause, and that the said record is a full, true and correct transcript of the record and proceedings had in said court, in accordance with said praecipe, as the same appears of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing record is \$——— for clerk's fees for preparing the transcript of record and \$——— for printing said record, and that the same has been paid by said appellants.

In testimony whereof I hereunto set my hand and affixed the seal of said Court, at Portland, in said district, on the —— day of ———, 1915.

Clerk.

IN THE  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

SCANDINAVIAN-AMERICAN BANK,  
 a corporation,  
 Petitioner and Appellant,

vs.

R. L. SABIN, Trustee of the Estate  
 of D. Sondheim, Bankrupt,  
 Trustee and Respondent.

In the Matter of D. Sondheim, Bankrupt.

**BRIEF OF PETITIONER AND APPELLANT**

Petition for revision of and appeal from a certain order  
 and judgment of the United States District  
 Court for the District of Oregon.

SIDNEY J. GRAHAM,  
 Attorney for Petitioner and Appellant.

SIDNEY TEISER,  
 ROSCOE C. NELSON,  
 Attorneys for Trustee and Respondent.

**Filed**

SEP - 3 1915

E. D. Monckton,

CLERK



IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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SCANDINAVIAN-AMERICAN BANK,  
a corporation,  
Petitioner and Appellant,

vs.

R. L. SABIN, Trustee of the Estate  
of D. Sondheim, Bankrupt,  
Trustee and Respondent.

In the Matter of D. Sondheim, Bankrupt.

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BRIEF OF PETITIONER AND APPELLANT

Petition for revision of and appeal from a certain order  
and judgment of the United States District  
Court for the District of Oregon.

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STATEMENT OF THE CASE.

This is a controversy between R. L. Sabin, as Trustee of the estate of D. Sondheim, Bankrupt, on the one hand and the Scandinavian-American Bank, on the other hand, over the ownership of a stock of merchandise. The Trustee in Bankruptcy claims the prop-



erty as part of the bankrupt estate. The Bank claims the property through possession of it secured before the levy of any creditor and before the filing of the petition in involuntary bankruptcy, and by virtue of an agreement entered into with Sondheim.

The facts are not in dispute.

On or about October 23, 1914, D. Sondheim, the bankrupt, whose business was buying and selling bankrupt stocks of merchandise, applied to the Scandinavian-American Bank for the sum of \$2600 to enable him to purchase the bankrupt stock of merchandise known as the D. N. Pally stock. He represented that this stock could be secured for \$5680 of which he lacked the sum of \$2600. He proposed that if the Bank would make the necessary advance, the merchandise would be held to protect it absolutely against loss on the sum advanced and on existing indebtedness which amounted at that time to the sum of \$2600. The Bank accepted his proposal and an agreement was thereupon executed in which it was recited among other things, "that the Scandinavian-American Bank has furnished to D. Sondheim the sum of \$2600.00 to be used to purchase the goods, wares, and merchandise of the store located at No. 146 Sixth St., Portland, Oregon, under an agreement to protect the said party of the second part absolutely on said purchase," . . . and "that the said D. Sondheim holds title to the same as trustee for the said party of the second part, in so far as the holding of said title is necessary to pay the party of the second part the sums of money owing by the party of the first part to the party of the second part," and "that

D. Sondheim shall keep an accurate account of each day's sales, and one-half of the moneys taken in for the sale of said goods in the course of each day, shall be turned over to the party of the second part at the opening of its banking hours the following day, until such time as the \$2600 advanced by the party of the second part and any other indebtedness to the extent of \$2600 owing by the party of the first part to the party of the second part shall have been fully paid and satisfied."

The stock of merchandise was thereupon purchased and the store opened. In lieu of the payment of one-half of the proceeds of the daily sales, Mr. Sondheim agreed in order to save the Bank bookkeeping that he would make weekly payments of \$500 until the entire indebtedness was discharged, and he authorized the Bank in the event that these payments were not made to charge his checking account.

Pursuant to this understanding, on Nov. 2, 1914, Mr. Sondheim made a payment of \$500; on November 12, 1914, his checking account with the Bank was charged in the sum of \$365 and on November 13, 1914, in the sum of \$195, and on that day on account of his failure to make the agreed payments, the Bank took possession of the stock of merchandise and sold it at retail for a period of ten days until restrained by an order of the District Court.

Three days after the Bank had taken possession of the merchandise proceedings in involuntary bankruptcy were instituted and shortly thereafter a petition was filed asking the Court to direct the Bank to turn

over this stock of goods as part of the bankrupt's estate.

The petition among other things alleged that the merchandise was claimed by the Bank under and by virtue of a certain instrument of writing which was in effect and in fact a mortgage and under which said mortgage the Bank took possession of the stock Friday, Nov. 13, 1914; that the said mortgage or agreement was not recorded nor acknowledged so as to entitle it to record and that it was, therefore, void as to creditors of the bankrupt; that the Bank refused to deliver possession of said stock.

The Bank answering the petition alleged in substance that under and by virtue of the agreement entered into with Sondheim and the understanding and intention of the parties, the title to the stock of merchandise at all times remained in it, and that prior to a levy by any creditor and prior to the filing of the petition in involuntary bankruptcy, the possession of the merchandise was surrendered to it; that it acted in good faith in all its dealings with Sondheim upon a sufficient consideration and without any intent to hinder, delay or defraud any creditor of said D. Sondheim.

Upon the issues raised by the pleadings the matter was referred to Mr. A. M. Cannon, as Special Master, to take testimony and report his findings and conclusions to the Court. In the meantime pursuant to a stipulation entered into between the Trustee and the Bank and approved by the Court, the stock of merchandise was sold and the net proceeds realized therefrom in the sum of \$3,476.70, deposited in the Scandinavian-

American Bank to abide the decision of the Court as to the ownership of the merchandise.

The Special Master after hearing the evidence adduced at the hearing, reported that the agreement with Mr. Sondheim did not constitute a contract of conditional sale or create a trust; that it amounted to a chattel mortgage and was void because it was not recorded and because it permitted Mr. Sondheim to remain in possession of the merchandise as apparent owner, selling it at retail. The Special Master also found that the Trustee had ample power and authority to maintain this proceeding, notwithstanding the fact that the Bank had possession before the lien of any creditor attached and before the filing of the petition in involuntary bankruptcy. He also found, and this is highly important, that the Bank entered into the agreement with Sondheim in good faith and with no actual intent on its part to hinder, delay or defraud any creditor of the bankrupt.

To the conclusions of the Special Master, that the agreement did not constitute a contract of conditional sale or create a trust, and that it was a chattel mortgage, void under the laws of the State of Oregon, and that the Trustee had ample power and authority to maintain this proceeding, the Bank duly excepted and from the orders of the District Court overruling its exceptions, prosecutes this appeal.

### SPECIFICATION OF ERRORS

The following are the specifications of error relied



upon by the appellant and which are intended to be urged upon this appeal. This specification of errors is the same as the assignment of errors (Transcript, page 82).

Petitioner and appellant believes and alleges the orders and decrees of the District Court to have been erroneous in that:

1. The Court overruled its exceptions to the Special Master's report.

2. The Court failed to sustain its exceptions to the Special Master's report.

3. The Court confirmed the report of the Special Master and further ordered that this Bank pay to the Trustee the sum of \$1,000.43, and the costs and disbursements of the proceedings.

4. The Court confirmed the report of the Special Master, holding the agreement in controversy did not amount to a contract of conditional sale, or a trust receipt.

5. The Court confirmed the report of the Special Master, holding the agreement in controversy void as a chattel mortgage under the laws of the State of Oregon.

6. The Court confirmed the report of the Special Master holding that the possession of the property by this Bank prior to a levy by any creditor and prior to the filing of the petition in involuntary bankruptcy did not entitle this Bank to hold said goods until its indebtedness was repaid.

7. The Court confirmed the report of the Special



Master holding that the Trustee could question this conveyance.

The Court made and entered the following orders and decrees:

“This cause was heard upon the exceptions of the Scandinavian-American Bank to the report of Mr. M. A. Cannon, Special Master herein, upon the petition of the receiver to require said Scandinavian-American Bank to turn over certain property or the proceeds thereof to the bankrupt estate, and was argued by Mr. Sidney J. Graham, of counsel for said Scandinavian-American Bank and by Mr. Sidney Teiser, of counsel for the Trustee of said bankrupt. On consideration whereof it is ordered that said exceptions be and the same are hereby overruled; that the report of the Special Master be, and the same is hereby affirmed, and that the Scandinavian-American Bank be, and it is hereby ordered and directed to turn over to the Trustee herein, the property or proceeds thereof as prayed for in the petition of said Trustee.”

And on the 21st day of May, 1915, omitting certain recitals therein, the following order and decree:

IT IS ADJUDGED, ORDERED AND DECREED that the exceptions to the Special Master's report be, and the same are hereby overruled.

AND IT IS FURTHER ADJUDGED, ORDERED AND DECREED that the Scandinavian-American Bank pay unto R. L. Sabin, trustee herein, upon surrender of the cashier's check held by him in the amount of \$3,-

476.70, the said sum of \$3,476.70, and the further sum of \$1,000.43, said latter amount being the net proceeds of sale realized by the Scandinavian-American Bank from the sale of property by it prior to the injunction order of this court and the taking possession by said R. L. Sabin of said property under said stipulation and order heretofore mentioned.

AND IT IS FURTHER ADJUDGED, ORDERED AND DECREED that the amount due by said Scandinavian-American Bank to Julius Efteland for ten days' services, as set forth herein, less the amount of \$36.40 paid him by said Bank, be, and the same is hereby a lien upon the funds in the hands of the trustee herein, and said trustee is directed to pay to the said Julius Efteland the amount due him by said Bank.

AND IT IS FURTHER ADJUDGED, ORDERED AND DECREED that said Scandinavian-American Bank pay unto said R. L. Sabin, trustee, interest at the rate of 6% per annum from the date of this decree upon said moneys, together with costs and disbursements herein."

The errors here specified in various forms may be summarized as follows:

1. Error in overruling the exception to the conclusion of the Special Master that the agreement in controversy did not constitute a contract of conditional sale or create a trust.

2. Error in overruling the exception to the conclusion of the Special Master that the agreement was in effect a chattel mortgage and void under the laws of the State of Oregon.

3. Error in overruling the exception to the conclusion of the Special Master that the trustee in bankruptcy had authority to maintain this proceeding.

## POINTS AND AUTHORITIES.

### I.

*Under the terms of the agreement the title to the merchandise remained in the Bank.*

Agreement between Sondheim and the Bank. (Transcript of record, pages 28 to 31.)

Testimony of the cashier of the Bank. (Transcript of record, page 51.)

Black on Bankruptcy, page 807, Sec. 564.

Loveland on Bankruptcy, Vol. I, page 843.

In re Cattus, 183 Fed. Rep. 733.

Charavay & Bodin vs. York Silk Mfg. Co., 170 Fed. 819.

Century Throwing Co. vs. Mueller, 197 Fed. 252.

### II.

*Considered as a chattel mortgage the agreement is valid under the laws of the State of Oregon.*

(a) A mortgagor may remain in possession of mortgaged property, selling it at retail, without rendering the mortgage void.

Currie vs. Bowman, 25 Ore. 364.

Sabin vs. Wilkins, 31 Ore. 450.

(b) The presumption of fraud raised by Section 799 L. O. L. is a disputable one and is overcome by evidence that a mortgage is executed in good faith and for a valuable consideration.

Sub. 40, Sec. 799, L. O. L., which reads as follows:

“Every sale of personal property, capable of immediate delivery to the purchaser, and every assignment of such property, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller or assignor, during his possession, or as against subsequent purchasers in good faith and for a valuable consideration, disputable only by making it appear on the part of the person claiming under such sale or assignment that the same was made in good faith for a sufficient consideration, and without intent to defraud such creditors or purchasers; but the presumption herein specified does not exist in the case of a mortgage duly filed or recorded as provided by law.”

Marks v. Miller, 21 Ore. 317.

Davis v. Bowman, 25 Ore. 189, 35 Pac. 264.

Report of Special Master (Transcript of Record, page 36).

Opinion of District Judge (Transcript of Record, page 79.)

(c) Possession of mortgaged property by a mortgagee under an unrecorded chattel mortgage before the

lien of any creditor attaches makes such a mortgage good against every one.

Jones on Chattel Mortgages, section 178.

Watson vs. First National Bank of Clarkston,  
143 Pac. 451.

Cook vs. Cooper et al., 18 Ore. 142, 22 Pac.  
945, 7 L. R. A. 273.

Martin vs. Halloway, 16 Idaho 513, 102 Pac. 3.

Martin vs. Sexton, 112 Ill. App. 199.

Williams vs. Miller, 6 Kan. App. 626, 49 Pac.  
703.

(d) Even without a change of possession, an unrecorded mortgage given in good faith is good against every one but subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property.

Section 7407, L. O. L., which reads as follows:

“Every mortgage, deed of trust, conveyance, or instrument of writing intended to operate as a mortgage of personal property, either alone or with real property, hereafter made, which shall not be accompanied with immediate delivery and followed by the actual and continual change of possession of the personal property mortgaged, or which shall not be recorded as provided in section 7405, shall be void as against subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property, or any portion thereof.”

Williams vs. First National Bank, 48 Ore. 571.



## III.

*The Trustee is without authority to maintain this proceeding.*

Sec. 47a, Amendment of 1910 to Bankruptcy Act.

Collier on Bankruptcy, 10th Ed., page 662b.

In re Flatland, 196 Fed. 310 (C. C. A. 9th Cir.).

## ARGUMENT.

## I.

*Under the terms of the agreement the title to the merchandise remained in the Bank.*

The language of the agreement and the intention of the parties determine whether it is a contract of conditional sale or a chattel mortgage. The agreement recites that the Bank has furnished D. Sondheim the sum of \$2600 to be used to purchase the merchandise at No. 146 Sixth Street, under an agreement to protect the bank absolutely on said purchase and that the merchandise was purchased with money furnished by the party of the second part, that is the Bank, and that the said D. Sondheim holds title in the same as Trustee for the said party of the second part in so far as the holding of the title is necessary to protect and pay back to the party of the second part the sums of money owing by the party of the first part to the party of the second part. The cashier of the Bank testified:

“Mr. Sondheim said that we would have the title but he wanted to handle the goods, to look after the managing part of it. After we were paid \$5200 then he would get the title back to the stock and we would have nothing to do with it. That was the understanding.” (Transcript of Record, page 51.)

This testimony is uncontroverted. The language of the agreement construed in its light is clear and plain. The title remained in the Bank and under the authority of the decision of this Court in *Meier & Frank vs. Sabin*, the record of a contract of conditional sale is unnecessary under the laws of the State of Oregon.

But even if the agreemnt did not constitute a contract of conditional sale in the strictest sense, it created such a relation between the parties that the Bank is entitled to hold the merchandise until its indebtedness is repaid. It is not an unusual transaction for a banker to make advances to a merchant to enable him to purchase a stock of goods, and Federal and State Courts are in unanimity in upholding such a transaction. In *re Cat-tus*, 183 Fed. 733, illustrates this. Here the banker made advances to a merchant to enable him to import a stock of merchandise and the merchant executed an agreement which contained inconsistent declarations regarding the title to the merchandise. Circuit Judge Ward, in rendering the opinion of the Court, among other things says:

“The purpose of the parties, describe the trust receipt as you will, was to keep the title to the goods in the bankers until their acceptances for the price of the goods

were paid. The courts without always defining exactly what the relations between the parties is, or always defining it in the same way, still are astute to protect the rights of the banks in such cases."

It is true that in this case the Bank furnished the entire consideration for the purchase of the merchandise, but whether a Bank advances all or but a portion of the purchase price should not affect the principle.

Mr. Black in his work on bankruptcy, page 807, says:

"Where a bank or an individual advances money to a merchant to enable him to buy or import a stock of goods, and the merchant executes a trust receipt, by which he agrees to hold the goods in trust for the one so advancing the funds and as the latter's property, but with liberty to sell the same in the course of trade and binding him to pay over the proceeds of such sales as fast as received until the advances are repaid, the title to the goods before repayment does not vest in the merchant in such sense that they will be assets of his estate in bankruptcy, but the cestui que trust will be entitled to reclaim the goods from the trustee in bankruptcy, or the proceeds if sold."

The Scandinavian-American Bank advanced the money to enable Sondheim to make the purchase of the stock of merchandise. He executed a trust receipt. He understood and the Bank understood that the title to the merchandise remained in the Bank until the indebtedness was repaid. He made payments on this indebtedness. Under these circumstances the title to

the merchandise did not vest in the Trustee in such sense that the merchandise can be claimed as part of the bankrupt estate.

## II.

CONSIDERED AS A CHATTEL MORTGAGE, THE AGREEMENT IS VALID UNDER THE LAWS OF THE STATE OF OREGON.

(a) *A mortgagor may remain in possession of mortgaged property, selling it at retail, without rendering the mortgage void.*

This point has been before the Supreme Court of the State of Oregon in several cases. The first decisions rendered by that court appeared to hold a chattel mortgage invalid which permits a mortgagor to remain in possession of the mortgaged property, selling it at retail. An examination of these cases, however, shows that either actual fraud was present in the execution of the mortgage, or that aside from permitting the mortgagor to remain in possession of the mortgaged premises, the mortgage was for the benefit of the mortgagor.

In *Orton vs. Orton*, 7 Ore. 748, for example, the mortgagor applied the proceeds realized from the daily sales to his own use. In *Bremer & Co. vs. Fleckenstein & Mayer*, 9 Ore. 274, the Court says: "We find the mortgagor in reality under no more restraint than if the mortgage had not been in existence." In *Pierce vs. Kelley*, 25 Ore. 95, cited in the report of the Special Master, a creditor had secured a lien by attachment upon

the property before there had been a sufficient change of possession.

In these essential particulars the early cases differ from the present case. Here we have a possession by Sondheim of but three weeks, an agreement entered into in good faith, a provision for the payment of one-half of the proceeds realized from the daily sales later modified in order to save bookkeeping to weekly payments of \$500, three payments actually made, one in the sum of \$500, one in the sum of \$365 and one in the sum of \$195, no creditor with a lien upon the property, and possession taken by the Bank.

The later decisions fully uphold the right of a mortgagor to remain in possession of the mortgaged property selling it at retail. The court first reaches this conclusion in *Currie vs. Bowman*, 25 Ore. 364. This was a suit brought by Currie as Receiver to have certain chattel mortgages delivered to the defendant Bowman declared invalid. It appears from the opinion that the *DuRand Piano Company*, the mortgagor, was practically insolvent at the time that the mortgages were executed and that while they were recorded the Recorder was requested not to give that fact out for publication in the official abstract. It further appears that the mortgagor remained in possession selling at retail for a period of about twenty days when the mortgagee took possession of the stock. The Supreme Court in reversing the judgment of the lower Court holds the mortgages valid and declares that in order to avoid a mortgage there must be a real design on the part of the mortgagor in which the mortgagee participates to with-



draw the property from the claims of creditors, and that if the mortgage is accepted in good faith there is not a fraudulent hindrance because the property is not disposed of in a way to prevent its application to the satisfaction of bona fide debts.

In *Sabin vs. Wilkins*, 31 Ore. 450, the court again upholds a chattel mortgage which permits the mortgagor to remain in possession selling at retail. This was a creditors' suit to have a chattel mortgage adjudged void on the ground that it allowed the mortgagor to retain possession of the mortgaged property, a stock of merchandise, and sell and dispose of it in the usual course of trade for his own use and benefit. Justice Wolverton, now Federal Judge, in rendering the opinion of the Court setting aside the judgment of the lower court, says:

“The creditors can only complain when the mortgage is executed or subsequently used as a shield for the special benefit of the mortgagor and thereby hinders or delays due process of law in reaching the property, and subjecting it to the payment of valid demands. The mere fact that it may lessen their chances of realizing their claims in full does not of itself render the transaction fraudulent, if the mortgage is otherwise fair and so treated; but it is the erection of a false muniment, not intended to secure the mortgagee so much as to ward off and defeat just demands that works the iniquity and to avoid which the law affords a remedy.”

These decisions leave no doubt as to the right of a mortgagor to remain in possession of mortgaged prop-

erty selling it at retail, and this is the chief objection raised by the Trustee to the present agreement. They clearly establish that it is not a question of whether the mortgagor or the mortgagee is in possession of the mortgaged property, but that it is a question of whether the mortgage is given in good faith and to secure a bona fide debt. This agreement was given in good faith and to secure a bona fide debt. This is the undisputed testimony; this is the finding of the Special Master. The objection of the Trustee is without merit. The possession of Sondheim did not invalidate the agreement.

(b) *The presumption of fraud raised by Section 799, L. O. L., is a disputable one and is overcome by evidence that a mortgage is executed in good faith and for a valuable consideration.*

Section 799, L. O. L., provides in substance that every mortgage of personal property, unless it be accompanied by an immediate delivery or unless the mortgage be recorded, creates a presumption of fraud as against creditors and subsequent purchasers in good faith and for a valuable consideration, disputable only by making it appear that the same was made in good faith for a sufficient consideration and without intent to defraud such creditors or purchasers. Construing this section in *Marks vs. Miller*, 21 Ore. 317, the Court says:

“Hence, a chattel mortgage under our statute, given in good faith, although not filed, is valid as against creditors and subsequent purchasers . . . . It is true in the earlier decisions the presumption of fraud from possession was held to

be conclusive, but the later and better considered cases hold that the fact of possession by the mortgagor is only *prima facie* a badge of fraud; that it may be rebutted by explanation showing the transaction to be fair and honest and consistent with the terms of the contract; and that the presumption of fraud arising from the circumstances of such possession is not an absolute inference of law but one of fact for a jury."

In *Davis vs. Bowman*, 25 Ore. 189, 35 Pac. 264, the Court says:

"As to such mortgages, not recorded or filed, there is a presumption of fraud which, unexplained, leaves them invalid, but which when explained, removes such presumption and leaves them intact and valid."

In the light of these decisions, it is clear that evidence of good faith overcomes the presumption of fraud. The cashier of the Bank testified to the circumstances attending the execution of the agreement. He detailed the conversation of the parties; he showed that \$2600 was owing to the Bank on prior loans and that the further sum of \$2600 was advanced to purchase the stock of merchandise. He explained why Sondheim was permitted to remain in possession. Upon his uncontroverted testimony the Special Master made a finding that the agreement was entered into in good faith. This effectually overcomes the presumption of fraud and leaves the agreement valid and binding.

(c) *Possession of mortgaged property by a mortgagee under an unrecorded chattel mortgage before the*

*lien of any creditor attaches, makes such a mortgage good against every one.*

The decisions are numerous on this point. A few citations will indicate the effect of possession.

In *Watson vs. First National Bank of Clarkston*, 143 Pac. 451, the Supreme Court of the State of Washington says:

“Where the mortgagee takes possession of the property conveyed by an unrecorded chattel mortgage, the mortgage speaks as of the date when the possession was taken. From that time the mortgage is valid as to all creditors who have not prior thereto acquired a right to the specified property or a lien thereon.”

In *Cook vs. Cooper, et al.*, 18 Ore. 142, 22 Pac. 945, 7 L. R. A. 273, the Court says:

“It results, therefore, that while a mortgagee is not permitted to maintain a possessory action to recover the mortgaged premises by reason of the default of the mortgagor, still, if he can make a peaceable entry upon the mortgaged premises after condition broken, he may do so, and may maintain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of his debt. This view of the law in no manner interferes with the just rights of the mortgagor and at the same time it does not sacrifice the interest of the mortgagee to the merest technicalities of the law which have sometimes been permitted to prevail and the mortgagee turned out of possession, stripped both

of the property and his mortgage debt as well."

Jones in his work on Chattel Mortgages, section 178, says:

"If a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody. If it was previously valid between the parties although it be not acknowledged and recorded or the record be ineffectual by reason of any irregularity, the subsequent delivery cures all such defects and it also cures any defect there may be through an insufficient description of the property. The delivery of possession under a mortgage before rights have been acquired by others will cure any invalidity there may be in the instrument whether arising from an insufficient description of the property and insufficient execution of the instrument, the omission to record it, or from its containing a provision which makes it void except as between the parties, as for instance an agreement that the mortgagor may retain possession and sell a stock of goods in the usual course of trade."

In *Martin vs. Hallowsay*, 16 Idaho 513, 102 Pac. 3.

the Supreme Court of Idaho in a well considered case, says:

"We believe that where a chattel mortgage is valid between the parties, even though for some reason it be void as to creditors, that if the property be delivered to the mortgagee prior to the time any specific right or lien upon the property is



acquired by a creditor, the possession of such mortgagee is valid."

The evidence discloses and it is undisputed that the Bank secured possession of the merchandise November 13th, 1914, a period of but three weeks after the date of the execution of the agreement. The evidence also discloses and it is undisputed, that the possession was taken before the lien of any creditor had fastened upon the merchandise and before the filing of the petition in involuntary bankruptcy. This entitled the Bank to hold the property until its indebtedness was repaid.

(d) *Even without a change of possession, an unrecorded mortgage given in good faith is good against every one but subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property.*

Section 7407, L. O. L., provides in substance that every chattel mortgage which shall not be accompanied by immediate change of possession or which shall not be recorded shall be void as against subsequent purchasers and mortgagees in good faith and for a valuable consideration. The statute does not say that such a mortgage shall be void against all creditors. Its operation is limited to subsequent purchasers and mortgagees in good faith and for a valuable consideration. This is the construction placed upon the statute by the Supreme Court of the State and it is fatal to the Trustee's case. In *Williams vs. First National Bank*, 48 Ore. 571, 87 Pac. 890, this point was before the Court. It appeared in that case that one Wickersham executed and delivered a chattel mortgage to the plain-

tiff which was not acknowledged and which the Court treated as an unrecorded mortgage; that subsequently Wickersham executed and delivered a chattel mortgage to the defendant covering the same property; that the defendant's chattel mortgage was duly recorded and that he had notice of the prior mortgage of the plaintiff. Upon appeal the defendant contended that an unrecorded mortgage which did not strictly conform to the provisions of the statute was void as to subsequent mortgagees and third parties, even though they had notice of its existence. Answering this contention the Court says:

“In support of this claim several cases are cited from other states, based upon statutes which were found upon examination to make no limitation upon the character of third persons against whom an unrecorded mortgage is declared void and are radically different from our statute which expressly declares that such mortgages ‘shall be void against subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property.’ The effect of this statute is to limit its operation to the classes mentioned, and clearly implies that such a mortgage is valid as to all others without being recorded.”

In the light of this decision and the direct and positive language of the statute it is clear that only subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same property can question a chattel mortgage executed in good faith, even though it is not recorded and even though the mort-

gagor remains in possession. The trustee in bankruptcy is neither a subsequent purchaser nor a mortgagee. He stands in the position of the creditors. They fastened no lien upon this property. They were neither subsequent purchasers nor mortgagees of it within the requirements of the statute. They could not set this agreement aside. The trustee cannot do what they could not do.

### III.

THE TRUSTEE IS WITHOUT AUTHORITY TO MAINTAIN THIS PROCEEDING.

The amendment of 1910 to the Bankruptcy Act confers upon the Trustee with respect to property not in the custody of the bankruptcy court, only the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied. This establishes no lien upon personal property, and unless some creditor had secured a lien the Trustee secures no greater rights in the property than the bankrupt had. Discussing this amendment, Mr. Collier in his recent work on Bankruptcy, at page 662b, says:

“If none of the creditors of the bankrupt had a lien by judgment, or otherwise, against the property in question, the amendment does not increase the Trustee’s rights but as to such property he stands in the shoes of the bankrupt.”

In support of this conclusion the author cites *In re Flatland*, 196 Fed. 310. This was a case recently decided by this Court in which it appears that one Mann

had advanced money to the bankrupt to purchase certain goods and fixtures; that immediately upon the advancement of the money the bankrupt executed a chattel mortgage; that at the time the mortgage was executed the goods were not in existence, but that thereafter the goods were purchased with the money which Mann had advanced. Counsel for the petitioner contended that while the mortgage was good between the parties, it was not good against the Trustee; that under the amendment of 1910 the Trustee did not stand in the shoes of the bankrupt but had all the rights of a creditor possessing a levy upon the property in controversy; and that if the lien of the chattel mortgage would not for any reason be valid as against a levying creditor, it would not be valid against the Trustee. Answering this contention, the Court says that "a conclusive answer to the suggestion here made is that there is nothing in the record showing that any of the creditors of the bankrupt other than the respondent, held any lien of any character." The Court then quotes with approval from *In re Chase*, 124 Fed. 753, 755; 59 C. C. A. 629, 631:

"It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant. *Williams' Law of Bankruptcy* (7th Ed.) 191. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or



the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery."

Under the admitted facts of the present case this decision is conclusive. The Bank secured possession of the stock of merchandise before the filing of the petition in involuntary bankruptcy. No creditor acquired a lien. It continued in that possession. So far as Sondheim was concerned, the agreement was unquestionably binding, and if binding upon Sondheim, it is binding upon the Trustee. He is clearly without authority to maintain this proceeding.

## CONCLUSION.

The agreement with Sondheim was entered into in good faith. The sum of \$2600 was advanced by the Bank and used to purchase the goods in controversy. The sum of \$2600 was owing on prior loans. Provision was made for the prompt repayment of these sums within a period of less than eleven weeks. Three payments were made, one in the sum of \$500, one in the sum of \$365 and one in the sum of \$195. Possession was taken by the Bank at the expiration of the third week because of the failure to make the payments. No creditor acquired a lien upon the goods and the possession of the Bank was secured before the filing of the petition in involuntary bankruptcy. Surely on such a record it would be a harsh law that would defeat the Bank's

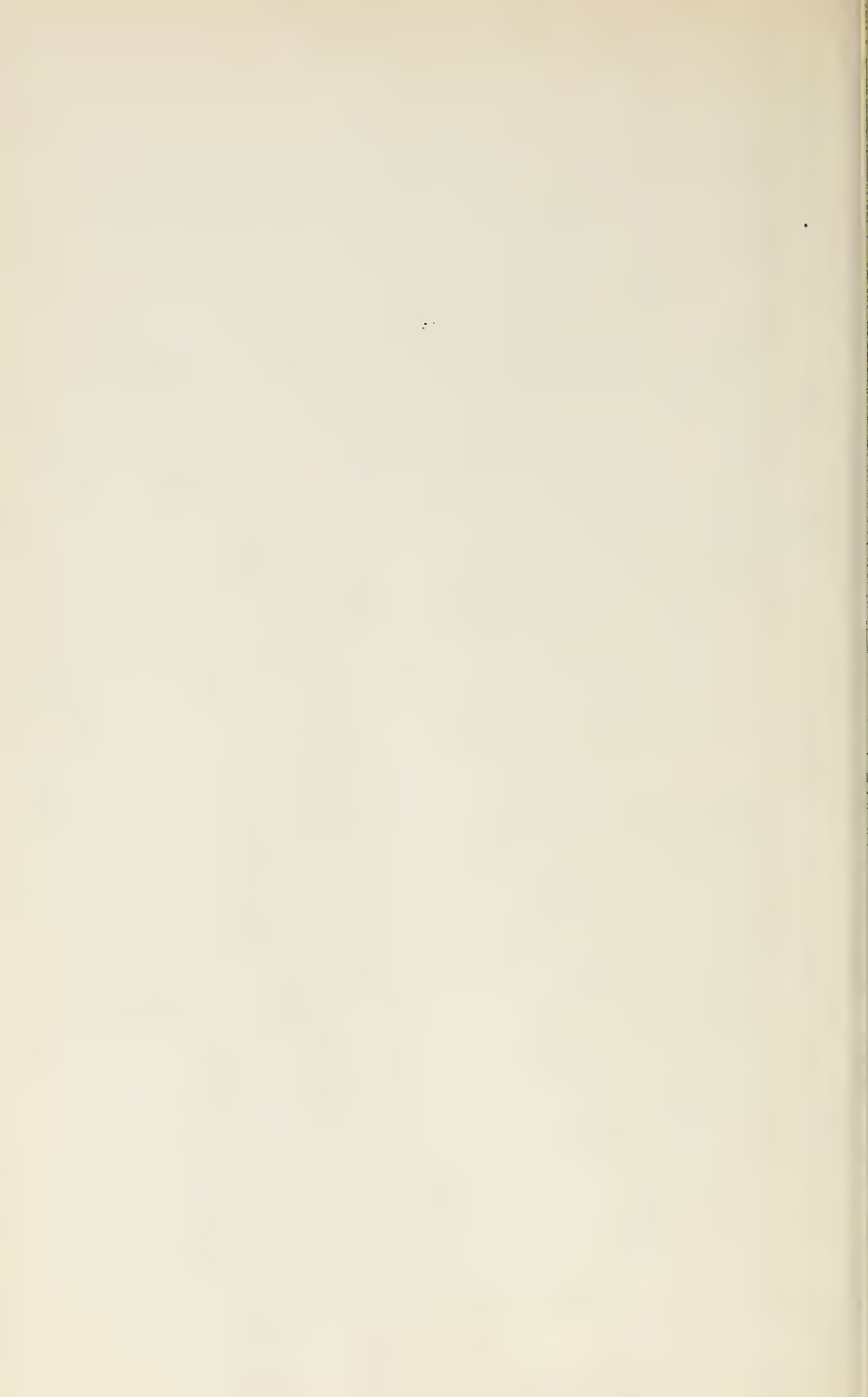


right to the property, or to the proceeds realized therefrom. The decree of the District Court should be reversed.

Respectfully submitted,

SIDNEY J. GRAHAM,

Attorney for Petitioner and Appellant.



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IN THE  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

SCANDINAVIAN-AMERICAN BANK,  
a Corporation,  
Petitioner and Appellant,

vs.

R. L. SABIN, Trustee of the Estate of  
D. Sondheim, Bankrupt,  
Trustee and Respondent.

In the Matter of D. Sondheim, Bankrupt.

**BRIEF OF APPELLEE.**

Petition for Revision of and Appeal from a Certain  
Order and Judgment of the United States Dis-  
trict Court for the District of Oregon.

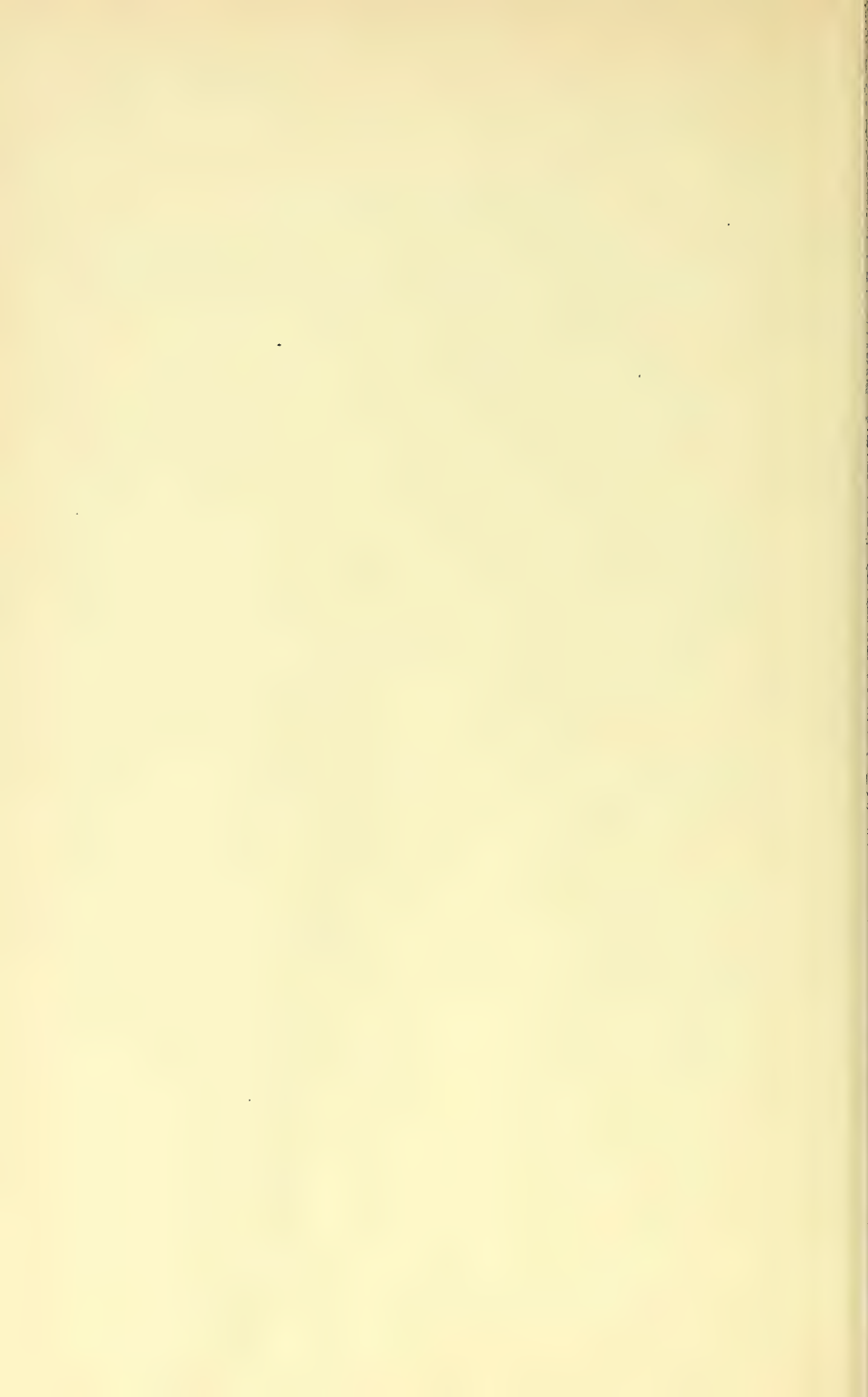
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IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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SCANDINAVIAN-AMERICAN BANK,  
a Corporation,

*Appellant*

vs.

R. L. SABIN, Trustee of the Estate of  
D. Sondheim, Bankrupt,

*Appellee*

In the Matter of D. Sondheim, Bankrupt.

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Petition for Revision of and Appeal from a Certain  
Order and Judgment of the United States Dis-  
trict Court for the District of Oregon.

BRIEF OF APPELLEE.

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STATEMENT OF FACTS.

There is no controversy with regard to the facts in this case. They will be found succinctly stated in the report of the Special Master (Transcript of Record,

pp. 33-36) and still more tersely yet adequately stated in the opinion of the District Judge, Hon. R. S. Bean (Transcript of Record, pp. 77-78.)

For the convenience of the Court, however, we will here condense the Statement made in the Appellant's Brief, adding—because of the fundamental importance in this, as in other controversies, of a clear understanding of the situation—a few points which the Appellant will not dispute and which are deemed vital by the Appellee.

About Oct. 23, 1914, D. Sondheim, the bankrupt, owed the Scandinavian-American Bank, Appellant, herein, the sum of \$2,600.00. He applied at that time for a further loan of \$2,600, which he told the bank he expected to use in *part* payment of the purchase price of \$5,680.00 for some merchandises known as the Pallay stock. The bank advanced the \$2,600.00, and Sondheim executed an agreement to the bank by which he undertook to protect it and set forth that he held title to the Pallay stock, as trustee for the bank, insofar as the holding of such title should be necessary to pay the bank for the money due it. The agreement further provided that Sondheim should keep an account of sales and turn over to the bank daily *one-half* of the preceding day's receipts until the \$2,600.00 then advanced and the \$2,600.00 formerly owing should have been repaid.

Sondheim did not (and the bank acquiesced in the omission) make the daily payments, but verbally agreed to give the bank \$500.00 per week until the indebtedness was discharged.

On Nov. 13, 1914, a few hours before the levy of the

attachment, the bank took possession of the stock, and three days thereafter proceedings in involuntary bankruptcy against Sondheim were instituted.

So far as this statement goes it is correct. Among other things, however, it omits these facts:

First. The bank never had title to or ownership of the stock of goods—title passed directly from the trustee in bankruptcy in the Pallay matter to Sondheim, and the business was continued and conducted by Sondheim as his own, the public generally and creditors of Sondheim in particular having no notice of any character as to the secret arrangement between Sondheim and the bank. The agreement with Sondheim was never recorded.

Second. After the agreement with the bank, Sondheim bought and sold goods, controlled the business in the regular way, deposited the proceeds of his sales to his individual account in the Scandinavian-American Bank, and checked on the account as he willed, without let or hindrance on the part of the bank.

Third. The bank did not take immediate possession under the agreement, the interval being some three weeks. It was only after Sondheim had disappeared and his whereabouts had remained unknown for several days, that the bank sent its agent to Sondheim's store—a few hours before the levy of an attachment.

## QUESTIONS OF LAW INVOLVED.

The Appellant has carefully avoided throughout the history of this matter any clear-cut statement of exactly what it claims to be the proper and legal effect of the agreement between it and Sondheim. Its position, as amended from time to time and after the abandonment of other equally ingenious and equally unsound contentions, is now apparently: (a) that the agreement is a conditional sale agreement, Sondheim to get title when he had finished paying the bank all that was due it; (b) that Sondheim held the stock in trust for the bank, the title being in the latter; (c) that the agreement amounts to a chattel mortgage to secure the bank the repayment of present and past advances; (d) that in any event the trustee could not attack the conveyance.

The brief filed by the Appellant argues all of these contentions and dogmatically and with sublime disregard of consistency, terms the considerations urged as to each "conclusive" and "fatal to the trustee's case"—the instrument is thus, according to Appellant, *plainly* a conditional sale agreement, *clearly* a trust certificate, and *surely* a chattel mortgage.

We will, for the sake of clarity, take up the contentions of Appellant in the order adopted by it in its Brief.



## I.

DID THE TITLE "REMAIN" IN THE BANK?  
CONDITIONAL SALE OR TRUST?

At page 12 of its Brief, the Appellant begins its argument, which is in three principal divisions, by setting out as the heading of division I,

"Under the terms of the agreement the title to the merchandise remained in the bank."

As we understand the ordinary connotation of the word "remain," this heading would pre-suppose as a fact that the title had at some time been in the bank. The facts as found by the Special Master—and they were not attacked on appeal—are as follows: (Transcript of Record, pp. 34-35.)

"During the time Sondheim was in possession of this stock he was so as sole and exclusive owner; he paid much more for the stock than the sum secured from the bank; *the muniment of title was his and not the bank's;*" etc.

Sondheim bought the "Pallay" stock from the trustee in the "Pallay" bankruptcy matter. The Scandinavian-American Bank was not known in the transaction. It never had title to the property and it is not

clear, therefore, how it can be contended that title always "remained" in it.

The Appellant argues that the cashier of the bank having testified that Sondheim told him that the bank would have title, but that Sondheim would want to handle the goods and that according to his (the cashier's) understanding, after the bank got back the \$2,600.00 it was advancing and the \$2,600.00 formerly due it, the bank would have nothing more to do with the matter, and the title would be Sondheim's—the agreement construed in the light of that testimony "is clear and plain," i. e., that the title "remained" in the bank and that the transaction thus amounted to a "conditional sale," and that the contract being a contract of conditional sale, was not required to be recorded under the laws of the State of Oregon.

We invite the Court's attention to the testimony of the cashier of the bank in this regard: (Transcript of Record, pp. 60-61.)

"Q. Now, from whom did Sondheim purchase this stock of goods? The stock in controversy on 6th St.?"

A. I understood he purchased it from Mr. Sabin?

Q. In the bankrupt proceedings of D. Pallay & Co.?

A. Yes.

Q. Did you have any conversation with the seller of the stock of goods?

A. No.

Q. You did not get any bill of sale from the seller, or anything of that sort, did you?

A. No.

Q. You knew the stock was being turned over to Sondheim by whoever was selling it?

A. Our understanding was that the stock would be in our name, that we would own title to it until we were paid.

Q. Did you take a bill of sale from the seller or do anything to get the title?

A. No.

Q. You understood that was the effect of this agreement which you had with Sondheim?

A. Yes.

Q. You had no agreement with the seller of the stock?

A. No.

Q. You knew that Sondheim was paying considerable more than \$2,600.00 for the goods, didn't you?

A. Yes.

Q. Did he tell you what he was paying?

A. I think he did.

Q. About \$6,000.00?

A. I think so?

Q. Did you investigate the stock to see whether it was worth what he said he was paying for it?

A. No.

Q. The bank didn't put its name on the store, or anything of that character, did it?

A. No.

Q. Sondheim ran the business just like he ran his other stores, did he?

A. Yes.

This testimony sufficiently shows that the bank never had title to the stock, and the agreement cannot be construed as a conditional bill of sale.

If the transaction were a conditional sale Sondheim would owe the bank nothing. The contract would amount merely to an agreement by which Sondheim might purchase the stock from the bank and procure title to it from the bank for \$5,200.00. The bank's former loan of \$2,600.00 would have been wiped out and there would be no obligation on Sondheim to repay it the amount formerly due or the \$2,600.00 advanced at the time of the purchase. It is manifest that no such curious relationship was intended by the parties, nor can it be inferred from any fair construction of the agreement.

However, even if by any fantastic construction the contract could be treated as a conditional sale, it would still be invalid. It is conceded that the bankrupt remained in possession of the stock, dealt with it as his own; deposited the proceeds of sales to his individual credit and checked on them as he saw fit. The District Court of the United States for the District of Oregon has expressly declared void a conditional sale agreement where the seller permitted such a course of conduct. See

*In re Rasmussen's Estate*, 136 Fed. 704.

*In re Roellich*, 223 Fed. 687.

"But," argues the Appellant, "even if the agreement did not constitute a contract of conditional sale in the strictest sense, there is a species of indefinable trust relationship and the merchandise is not part of the bankrupt estate, but belongs to the bank until it gets out of it not only the \$2,600.00, constituting less than half what Sondheim paid for the stock, but the additional

\$2,600.00 which he had been owing the bank a year or more.”

In support of this proposition the Appellant cites

*In re Cattus*, 183 Fed. 733, and  
*Black on Bankruptcy*, p. 807,

to the effect that where a bank purchases, or advances to a merchant money for the purchase of a stock of goods, and the merchant executes a trust receipt by which he agrees to hold the goods in trust as the property of the bank, “but with liberty to sell the same in the course of trade and binding him to pay over the proceeds of such sale as fast as received until the advances are repaid,” the title to the goods does not vest in the merchant until the advances have been repaid.

It would not be productive of any advantageous results to enter into a discussion of whether or not the doctrine of this type of case is applicable in Oregon, because the facts in all the cases we have examined are clearly distinguishable from those in the instant case, and we have no occasion here to dispute the accuracy of the conclusions there reached. It will be apparent from an examination of the *Cattus* and other cases, for instance, that

- (a) The bank was the *owner* of the property.
- (b) The bank had paid drafts and *purchased* the bills of lading for the goods.
- (c) The bank paid the *whole* of the purchase price.
- (d) The goods were then turned over to the indi-



vidual under an agreement that the individual should sell them for the account of the bank and turn over *all* the proceeds to the bank.

(e) The bank required the merchant to live up to the last mentioned arrangement.

(f) The goods were insured in the name of the owner—the bank.

To claim that such a doctrine, whether sound in any case or not, is applicable to a case like the instant one, where the bank advanced only *part* of the purchase price, and *permitted* the merchant to conduct the business as his own, buying and selling in the ordinary course of trade, depositing the money to his individual credit, checking on it as he pleased, rendering no account, etc., is a monstrous perversion of a doctrine supposedly based upon the principles of fair dealing.

In determining the validity of the asserted “lien” the laws and practice of the State of Oregon will be followed, and neither the statutes of Oregon nor the decisions of that state countenance any such thing as a “trust” by which a man can do business in his own name, deal in a shifting stock of goods, use the proceeds as he sees fit, and when his creditors seek to have his assets applied to the payment of his debts, claim immunity from attack by virtue of the secret existence of an unrecorded agreement, in the execution of which the debtor has then been left in uncontrolled possession and use of his assets.

The Appellant confines itself to a discussion of the “language” of the agreement. It is believed that this

Court will be at least equally interested in the manner in which the transaction was *actually carried out*, and an examination of the *acts of the parties* will instantly condemn the agreement as in its nature necessarily and essentially a fraud upon the creditors in the sense of the settled law of the State of Oregon and of other jurisdictions, that any transaction by which a person in possession is given the benefits of unencumbered property while his creditors are prevented from collecting their claims, is, without regard to the intention of the parties, fraudulent as a matter of law. It will be quite clear from a reading of *In re Cattus*, and from an inspection of the section quoted by Appellant from Black on Bankruptcy that neither that Court nor that text-writer, had in mind sanctioning a course of conduct on the part of a bank entering into an agreement of the nature pronounced valid, but in actual practice, permitting the individual to make sales as he saw fit, and use the proceeds *for his own purposes, without* accounting therefor to the bank. In any event a fair reading of the opinion in *In re Rasmussen Estate*, 137 Fed 704, and *In re Roellich*, 223 Fed. 687, will render it clear that in Oregon at least such an arrangement is void as to creditors whether it is called a conditional sale, mortgage, contract, trust, or by whatever nomenclature the ingenuity of counsel may devise.

## II.

IS THE CONTRACT VALID CONSIDERED  
AS A CHATTEL MORTGAGE?

The Appellant, arguing this contention, sub-divides its arguments into four parts. The first of these minor sub-divisions is expressed by Appellant as follows:

(a) "A mortgagor may remain in possession of mortgaged property, selling it at retail, without rendering the mortgage void."

This declaration is distinctly incorrect and misleading, unless there be added "*provided* he is in possession as agent of the mortgagee, and the *proceeds* of the sales are *accounted* for and turned over to the mortgagee to be *applied* upon the mortgage indebtedness."

The Appellant cites Oregon cases, with the doctrine of which it must be assumed to be familiar, rendering this clear, and the conclusion follows that it understands the significance of this proviso, but omitted it because its acts in the instant case were in direct contravention thereto.

Oregon cases holding in accordance with the contention of the trustee here are referred to by Appellant, but glibly explained away on the theory that the mortgage in those cases was declared void because "*for the benefit of the mortgagor*." The temerity of Appellant

in this regard is little less than startling, when it is borne in mind that such is precisely the situation in the instant case, according to the findings of the Special Master, which Appellant does not attack!

Thus, Appellant avoids *Orton vs. Orton*, 7 Ore. 748, holding such a chattel mortgage invalid because, says Appellant, in that case, "the mortgagor applied the proceeds realized from the daily sales to his own use."

The audacity of this "distinction" will be appreciated when reference is had to the opinion of the Court below, wherein, referring to the provision of the instrument with reference to the account of sales, the learned Judge remarked:

*"This latter clause (i. e., accounting, etc.), was not observed, but Sondheim bought the stock of goods, assumed control of it, sold and disposed of it in the regular course of business, deposited the proceeds to his individual account in this bank and checked them out as he saw proper."* (Transcript of Record, p. 78.)

The Master found the same facts and there is no appeal from these findings. It is manifest, therefore, that the conduct of the transaction in the instant case comes precisely within the inhibition of the Oregon courts.

*Bremer vs. Fleckenstein*, 9 Ore. 274, gives Appellant no concern, because it quotes the Court in that case as

saying: "We find the mortgagor in reality under no more restraint than if the mortgage had not been in existence." If the mortgagor had any more freedom than Sondheim had, as above set forth, the Appellant has not pointed out the particulars in which such ultra-liberty appears.

See to the same effect:

*Aiken vs. Pascul*, 19 Ore. 493;

*Fisher vs. Kelly*, 13 Ore. 1.

Appellant then argues that the "later" Oregon decisions fully uphold the right of a mortgagor to remain in possession, selling at retail. Again, we assert that the significant proviso with reference to the actual accounting not only being required in the mortgage itself, but actually followed in the course of the transaction, is a *sine qua non* of validity.

The first of these "later" decisions cited by Appellant is *Currie vs. Bowman*, 25 Ore. 364, in which the Supreme Court distinctly found (see pages 383-384) "that the mortgagor *did account for and pay over the* proceeds of the stock." Because of the selling of a few small items on credit the mortgagee took possession of the stock and proceeded to sell it himself. The Court said that the mortgagor "was *vigilant*," and that his conduct showed he intended the terms of the mortgage "to be strictly observed, and that any departure therefrom would not be tolerated."

Just what aid or comfort Appellant gathers from



that decision is not apparent. Appellant was the reverse of vigilant, according to the learned Judge of the District Court, and according to the Special Master. There is no pretense of an account of sales and no restriction of any character imposed upon Sondheim in his utilization of the proceeds.

The next "later" decision cited is Sabin vs. Wilkins, 31 Ore. 450, where, says the Appellant, "the Court again upholds the chattel mortgage which permits the mortgagor to remain in possession selling at retail." In that case the Supreme Court distinctly pointed out (page 458) that the mortgage "permits the mortgagor to retain possession of the property, but *expressly forbids the sale or disposal of it, or of any part thereof by the mortgagor*. The testimony showed that the mortgagee herself took charge of the business, took all of the receipts and disbursed them herself. There was no testimony whatsoever tending to show that the mortgagor sold anything from the store himself or that he obtained or used any of the proceeds of the sales. It will be quite apparent from the most cursory reading of this decision that it was based particularly on the fact that the mortgagor was not permitted to conduct the business in the usual course, as before, or to use or appropriate the proceeds of the sales for his own use and benefit. In fact it is distinctly stated at page 456 that such a mortgage should be held invalid, whenever it appears "either upon the face of the mortgage or by *parole evidence aliunde*, that the mortgagee of personal property has given the mortgagor unlimited power and authority to dispose of the property in the usual course of trade for his own use and benefit." And the Court, further discussing the

matter, says, in substance, that whether the objectionable feature appears in the mortgage itself, or where made by independent agreement, express or implied, either at the time the mortgage was entered into or subsequently thereto, the mortgage is thereby converted into an instrument for the benefit of the mortgagor and is fraudulent, and void from the time such purpose is promoted.

We assert, without fear of successful contradiction, that there has been no deviation from the doctrine of *Bremer vs. Fleckenstein*, 9 Oregon 266.

The latest decision of the Supreme Court of Oregon on this subject indicates firm adherence to the fundamental importance of the proviso with regard to the actual conduct of the parties in the operation of the transaction. We refer to the case of *Gregg vs. Mueller*, 133 Pac. 94. In that case a mortgage was executed upon a shifting stock of goods, the instrument requiring the mortgagor to account for sales. In actual practice, however, the mortgagor was permitted to make sales without accounting for the proceeds, and the Court held that the mortgage was fraudulent and void. It is true in that case the element of actual fraud was present, but the decision fairly enunciates the following principles of law as applicable to chattel mortgages on shifting stocks of goods in the State of Oregon.

That a mortgage on a shifting stock, where possession remains in the mortgagor with power of disposition, in the usual course of trade, is void, unless the mortgage contains a provision for an accounting to the mortgagee and application of the moneys in payment of the debt

secured, and such provision for accounting is made in good faith and no laches occurs on the part of the mortgagee in the shape of permitting the mortgagor to deviate from the strict terms of the mortgage with regard to such accounting and application of the proceeds.

Accordingly, the Court held that although the mortgage on its face was a valid mortgage in that it provided for an accounting, yet, inasmuch as the mortgagee by reason of his laches, permitted the mortgagor to neglect such accounting he thereby converted the mortgage into an instrument for the benefit of the mortgagor, thus raising an indisputable presumption of fraud.

It is also a fact, which we believe this Court will not regard as of minor significance, that this contention on the part of the Appellant as to the effect of the decision of the Oregon Supreme Court was presented to District Judge Bean, himself formerly a member of the Oregon Supreme Court and a participant in some of the decisions referred to, and this learned Judge disagreed with Appellant's comprehension of these decisions, stating his disagreement in this language: (Transcript of Record, p. 79.)

\* \* \* "as I understand the decisions of the Oregon Courts, a mortgage on a shifting stock of goods where the mortgagor is permitted to remain in possession and sell and dispose of it in the regular course of business, appropriate to his own use, or use as he may see proper, is void as to creditors, and therefore this instrument, I take it, is a void instrument

and did not give the bank any preference over the other creditors of this concern."

Appellant, however, lays as a flattering unction to its soul, the finding that "the agreement was given in good faith and to secure a bona fide debt." (Appellant's Brief, p. 18.) The vice of this and similar transactions lies, however, not in the question of the *subjective* state of mind of the mortgagee, but in the *effect* upon the creditors and those who have a right to object to any such false situation as would arise from the rendering possible for a creditor by calling itself secured, to permit a debtor the retention of his property and its conversion into money, with the immunity of the money from the claims of his creditors, while not requiring that it be applied in reduction of the secured claim.

This was distinctly pointed out by the United States Supreme Court in *Knapp vs. Trust Company*, 216 U. S. 545, where that Court, applying Wisconsin statutes *identical* in terms with Sections 799 and 7407 Lord's Oregon Laws, held that *notwithstanding a finding of the existence of good faith*, a mortgage which permitted the exercise of control by the mortgagor over property left in his possession was void as to creditors.

The Circuit Court of Appeals for the Ninth Circuit has furthermore stated its understanding of the doctrine of the Oregon cases, in *Peterson vs. Sabin*, 214 Fed. 234, in the following language:

"That court (the Supreme Court of Oregon) has distinctly held that where a mortgagee has given the mortgagor un-



limited power to dispose of the mortgaged property for his own use, the mortgage is void as to creditors of the mortgagor, *even if there was no actual fraudulent intent on the part of either of the parties to the mortgage.*" (Italics ours.) Citing *Orton vs. Orton*, 7 Ore. 478; 33 A. S. R. 717; *Jacobs vs. Ervin*, 9 Ore. 52.

And while the Special Master does acquit the bank of any actual intention to defraud the creditors, he makes this just and pertinent criticism of the flagrant course of the bank from the standpoint of creditors: (Transcript of Record, p. 41.)

"In the first place, this mortgage never was recorded, which, in itself, is a prominent piece of vice, and the manner in which the parties conducted themselves under the mortgage cannot be justified upon any ground whatever. Sondheim was in the sole and exclusive possession as the owner; he sold as he pleased; bought as he pleased; rendered no account whatever to the bank, though it was stipulated that he should; the money derived from sales was deposited to his general account in the same bank and checked out by him unrestrained; indeed, the slight protective measure agreed upon aliunde the mortgage, that he should pay on his notes \$500.00 per week, was ignored and finally charged by the bank against his general account, perhaps from moneys received by him from other sources. *As I have pointed out, there was not an indication, either off or on the record, by which any person could have been warned that the*



*bank had the remotest claim upon this store, and hence it was, perhaps, that Sondheim was able to secure credit for merchandise running into the thousands of dollars after this mortgage was given. Whether so intended or not, this was a fraud, beyond dispute, and I do not think creditors are, or should be, bound by an arrangement fraught with such entire absence of candor or open dealing. The effect of it was to conceal from the creditors completely the fact that Sondheim's property was encumbered, to enable him to sell and dispose of it regardless of that fact, and thus to hinder and delay them. To this the bank was a party and must be held to have intended what its attitude accomplished."*

The next minor sub-division is thus stated by Appellant:

"(b) The presumption of fraud raised by Section 799, L. O. L., is a disputable one and is overcome by evidence that a mortgage is executed in good faith and for a valuable consideration."

We shall deal very briefly with this contention, which seeks to avoid the consequences of the *failure to record* the instrument, asserting that that failure creates not a conclusive but a disputable presumption of fraud, and that inasmuch as there was a finding of good faith, the agreement is left valid and binding. The trustee did not base his claim of invalidity on the mere "failure to record." The chattel mortgage, if the agreement is a

chattel mortgage, is void because in its operation it was a fraud upon the creditors for reasons pointed out fully in the preceding sub-division, and as stated by the U. S. Supreme Court in the case of *Knapp vs. Trust Co.*, 216 U. S. 545,—i. e., the good faith of the mortgagee, who permits such a fraud upon the general creditors, does not confer sanctity on the transaction.

The third minor sub-division is stated by Appellant as follows:

“(c) Possession of mortgaged property by a mortgagee under an unrecorded chattel mortgage before the lien of any creditor attaches, makes such a mortgage good against every one.”

Proceeding to argue the correctness of this statement, Appellant remarks that the decisions are numerous on the point, and cites three, and one text writer. This Court, we apprehend, is particularly interested in what the Supreme Court of Oregon says on the subject. The Appellant calls attention at page 20 of its Brief to the case of *Cook vs. Cooper*, 18 Ore. 142, which deals with the right of a mortgagee to take possession of mortgaged property after default, etc., and which is not even remotely in point, and the Appellant carefully refrains from calling the Court's attention to the case of *Pierce vs. Kelly*, 25 Ore. 95, in which Mr. Justice Bean gave a clear exposition of the meaning of the requirement of the Oregon statutes with regard to an immediate change of possession as a pre-requisite to the

validity of a transaction based on an unrecorded instrument.

Said Judge Bean:

“By sub-division 40 of section 776 of Hill’s Code it is provided, in substance, that every mortgage of personal property, capable of immediate delivery, which is not filed or recorded, shall be presumptively fraudulent as to creditors, of the mortgagor unless it is accompanied by an *immediate* delivery and be followed by an *actual* and *continued* change of possession. In this case the mortgage was not filed or recorded, and hence this presumption would attach unless there was an actual and continued change of possession of the mortgaged property. The change of possession necessary to overcome and rebut this presumption *must be actual*, and not merely constructive or legal; it must be effected in a way *calculated to give notice to the public* that there has been a change in the ownership of control of the property, and a mere constructive possession, or one taken by words and inspection, will not satisfy the statute. Cobbey, Chattel Mortgages, Sec. 497. The possession of the mortgage must be *exclusive*, and *accompanied with such outward acts and indicia of ownership* as will apprise the public, and particularly those who are accustomed to deal with the parties, that the goods have changed hands, and the possession has passed from the mortgagor to the mortgagee. There must be a complete change in the dominion and control over the property, and a concurrent or

joint possession with the mortgagor is not sufficient (McKibbin vs. Martin, 64 Pa. 352, 3 Am Rep. 588; Kitchen vs. Reinsky, 42 Mo. 437,) although where there is such a change in the possession and control there perhaps can be no legal objection to the employment of the mortgagor to render services in and about the business, as any other agent or employe."

(Italics ours.)

The cashier of the bank admitted that the bank did not give any notice of its claim on the store or stock; that Sondheim conducted the store exactly as he conducted his other stores; that Sondheim made other purchases of stock on which the bank kept no check; that the bank did not pay the salary of any employee of Sondheim's; that Sondheim made no reports; that no check was kept on the proceeds of sales, but Sondheim was given unlimited power of disposition thereof.

There is no question under this testimony that the bank did not have possession of the stock at any time before November 13, 1914, as possession is to be understood in the light of Judge Bean's construction of the statute. When it did take possession, a few hours before attachment, its possession was not open, exclusive or notorious, nor was it taken or continued in such a manner as to give its possession these attributes.

On November 13, 1914, when Sondheim's disappearance had remained unexplained for days, the bank, after becoming apprised of the fact that suits had been instituted by creditors against Sondheim and writs of attachment issued, a few hours before the levy of attachments was made placed a man named Eftland in charge of the



stock (Special Master's Report, Transcript, page 35,) all other original employees of Sondheim remained. The only change in the situation was the addition of Eftland to the corps of clerks. This was the first suggestion of any change of possession. This took place, it is conceded, three weeks after the execution and delivery of the chattel mortgage or agreement under attack. The Oregon statutes in both instances precisely and explicitly declare that the only change of possession which applies is the "*immediate.*" change, i. e., one made promptly upon the execution and delivery of the instrument. The failure to record, therefore, was not cured by this belated taking of possession.

Inasmuch as this question must be determined in the light of the statutes of the particular state in which the transaction occurs, decisions from other states, unless the statute of such state contains precisely the same terminology as the Oregon statute, are not instructive. The truth of this observation will be apparent from a consideration of the case of *Martin vs. Halloway*, 16 Idaho 513, cited in this connection by Appellant at page 21 of its Brief, as authority for the doctrine that possession cures the defect if it occurs prior to the acquiring of any specific lien.

An examination of the Idaho statute under review in that case will show that the word "*immediate*" used in the Oregon statute is omitted. It provides that change of possession cures a failure to record, but this change is *not* required to be an immediate one. The case, therefore, is, of course, not in point in Oregon.



For the convenience of the Court we append significant sections of the Oregon Code:

Sec. 799 (sub-section 40) L. O. L.:

“Every sale of personal property, capable of *immediate* delivery to the purchaser, and every assignment of such property, by way of mortgage, or security, or upon any condition whatever, unless the same be accompanied by an *immediate delivery*, and be followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller or assignor, during his possession, or as against subsequent purchasers in good faith and for a valuable consideration, disputable only by making it appear on the part of the person claiming under such sale or assignment that the same was made in good faith, for a sufficient consideration, and without intent to defraud such creditors or purchasers; but the presumption herein specified does not exist in the case of a mortgage duly filed or recorded as provided by law;”

Section 7407:

“Every mortgage, deed of trust, conveyance, or instrument of writing intended to operate as a mortgage of personal property, either alone or with real property, hereafter made, which shall not be accompanied with *immediate* delivery and followed by the actual and continual

change of possession of the personal property mortgaged, or which shall not be recorded as provided in Section 7405, shall be void as against subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property, or any portion thereof."

(It will be borne in mind that this instrument was never recorded.)

We wish to emphasize in this connection that the *only effect* even immediate change of possession would have had, would be to cure a *failure to record*. Appellant overlooks the fact that recordation of this instrument would *not* have given it validity. In the case of *Bremer vs. Fleckenstein*, and in the other Oregon cases in which the doctrine of the *Bremer* case was approved and followed, the *mortgage was actually recorded*, but was nevertheless held to be void for the reasons already referred to at length.

The precise contention made by Appellant in this connection was adversely disposed of by District Judge Bean in the case of *Schaupp vs. Miller*, 206 Fed. 255. The facts in the *Schaupp* case were much stronger against the trustee than in the instant case, the mortgage there having been recorded and the possession having been taken by the mortgagee two months before the adjudication in bankruptcy. Nevertheless, inasmuch as by the acts of the parties the mortgagor had been permitted to continue in possession, selling the goods at retail in the usual course of business and not

accounting for the proceeds, the Court held that the mortgage was void and that the invalidity was not cured by the taking possession on the part of the mortgagee some two months before the adjudication.

That the point raised by Appellant here is clearly involved and fully considered in the Schaupp case is apparent from the following excerpt from the opinion of Mr. Justice Bean:

“From the facts as so stipulated, it is apparent that the mortgages were originally invalid, but the position of the defendant is that the possession taken by him in pursuance of the terms of the mortgage before the adjudication and before other creditors had seized the property cured the defect. The effect of a mortgagee taking possession of property covered by a mortgage like the one in question has been much discussed by the courts, and there is not entire harmony in the decisions. It seems to depend on whether the mortgage is regarded as fraudulent in fact and void *ab initio*, or only presumptively fraudulent. In Oregon such a mortgage is held to be fraudulent in fact and from the beginning, for the reason as stated by Mr. Justice Moore in *Fisher vs. Kelly*, 30 Ore. 1, 46 Pac. 146: “It is for the mortgagor’s own use and benefit.”

(Citing *Orton vs. Orton*, 7 Ore. 478, and other Oregon cases. \* \* \* \*)

Where such a rule prevails, the courts generally hold that possession taken by the mortgagee does not purge the original transaction of its fraudulent character, because a void instrument cannot be the

foundation of a valid lien." Citing numerous cases.

The next minor sub-division adopted by the Appellant is thus stated:

"(d) Even without a change of possession, an unrecorded mortgage given in good faith is good against every one but subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property."

It is then argued that inasmuch as Section 7407, L. O. L., declaring invalid instruments intended to operate by way of mortgage, where same are not recorded, and there is no immediate change of possession, *limits* the class as to which the invalidity results, to subsequent purchasers and mortgagees in good faith and for a valuable consideration; the trustee not being a member of this class, the failure to record or transfer possession does not concern the trustee.

Reliance is placed by Appellant on the case of Williams vs. Bank, 48 Oregon 571, in which the Court held that one who had *actual notice* of a prior mortgage, even though unrecorded, could not claim to be a mortgagee in good faith. Appellant is apparently oblivious of the fact that in the case of Williams vs. Bank, there was *no* question as to the *validity* of the mortgage. The only question was whether an otherwise valid mortgage should be held void as to a subsequent mortgagee who

had *actual* notice of the prior valid mortgage, though the latter was not recorded.

Manifestly we are not concerned with any such question. It is constantly to be borne in mind that in none of the Oregon cases declaring chattel mortgages on shifting stocks of goods, with unrestrained possession of the mortgagor, either by the terms of the instrument or in actual practice, void for reasons of public policy, is the question of recordation or non-recordation even remotely involved. In point of fact, as heretofore stated, in *Bremer vs. Fleckenstein* and kindred cases, the mortgage *was* recorded. See also *Scaupp vs. Miller*, 206 Fed. 575.

While it is believed that this sufficiently answers the contention of the Appellant in this regard, we respectfully call the Court's attention to Section 799, L. O. L., which provides that every assignment of personal property by way of security, unless the same be accompanied by immediate, actual and continued change of possession, is presumed to be fraudulent not only as to mortgagees and purchasers, but as to the "creditors of the seller, or assignor, during his possession."

However, we reiterate that the reason the bank's claim of lien is without merit is *not* because of any statutory provision as to recordation, but because of a *basic equitable principle* followed in practically every state in the Union, with or without express provision of statute, and based upon the principles of common honesty and fair dealing. As was said In re *Rasmussen*, 176 Fed. 704, commenting upon the case of *Orton vs. Orton*, 7 Ore. 478:



“In this decision the Court merely enforced a rule of general application—that a possession that is inconsistent with the conveyance is a fraud in law. And the rule is necessarily the same whether the possession is retained by the vendor, or is transferred to the vendee, contrary to the conditions of the sale or inconsistently with its purpose.

The property claimed in the present case was delivered to the bankrupt with the intention that it should be sold by him in the course of his business as a merchant. The bankrupt’s possession was in itself inconsistent with the express terms of some of the agreements of sale, and its purpose was inconsistent with all of them.”

### III.

## THE AUTHORITY OF THE TRUSTEE TO MAINTAIN THIS SUIT.

This point is discussed by the Appellant under the heading:

“The trustee is without authority to maintain this proceeding.”

(The argument in this regard has no reference to the *nature* of the proceeding which was the subject of stipulation, and specifically concurred in by Appellant’s Answer.)

The contention of the Appellant in this connection is that no creditor had secured a lien upon the personal property at the time the bank took possession of it an hour before the levy of the attachment, and hence the trustee secured no greater rights than the bankrupt himself had. The trustee, contends the Appellant, simply stood "in the shoes of the bankrupt."

What Appellant really means and what some of the decisions and some of the text-writers employing similar language loosely, really mean, is that the trustee, as to property not reduced into possession, does not have the rights of a creditor holding a *lien* upon that particular property.

It was never the law before the Amendment of Section 47 (a) of the Bankruptcy Act in 1910, and certainly not since the Amendment of 1910, that the trustee did not have the rights of an ordinary, simple contract creditor of the bankrupt. The trustee, as a matter of fact, represents the creditors and stands "in the shoes of the creditors." If a proposition which is apparently axiomatic needs demonstration, it would be a simple matter to sustain the accuracy of this statement, but it is believed that the statement suffices.

The whole Argument of Appellant in this connection is based on the assumption that the instrument construed as a mortgage is invalid only as to lien creditors. This is its major premises. The trustee, says Appellant, is not a lien creditor under the Amendment of 1910. This is its minor premise, and its conclusion naturally follows that the trustee "is clearly without authority to maintain this proceeding."

The only weakness of the syllogism is the utter incorrectness of the major premises, but this defect greatly

impairs the value of the conclusion. Thus, in the case of *In re Flatland*, 196 Fed. 310, the opinion dealing with the right of a trustee to attack a mortgage, specifically excepts from its operation cases where the disposition of property by the bankrupt was void because fraudulent. In the *Flatland* case the lien under attack was conceded to be a valid, equitable lien.

The precise contention made by Appellant, i. e., that the invalidity is only as to lien creditors, was raised and answered by the Supreme Court of Oregon in the case of *Jacobs Bros. vs. Ervin*, 9 Ore. 52. There a mortgage has been executed and the mortgagor retained unlimited power of disposition without accounting. Subsequently the mortgagor made a general assignment. The mortgagee, resisting the claims of the assignee, contended that even though the mortgage was void under the doctrine of *Bremer vs. Fleckenstein*, yet the assignee, being subrogated to the rights of *general creditors*, only, and there being no lien creditors, the assignee had no standing in court. The Supreme Court thus answered this contention at page 59:

“The right of the general creditors to impeach or resist a fraudulent transfer or incumbrance attaches to the property, and we can conceive no inconsistency in holding that that right vests in the assignee under the assignment which they have assented to. He is the trustee of the creditors, as well as of the debtor, and holds the property assigned to him in trust for the payment of their claims against the debtor. With their consent he has taken the title and possession of the property and represents the interest which they have in it,

and it would be a narrow construction, indeed, that would deny that he represents their whole interest; especially would this be the case where it so plainly appears, as it does in such cases as the present, that such a power is necessary, in a vital degree, to enable him to effectually administer his trust."

The Court said further in that case that it had not been cited to nor had it been able to find a *single decision denying to the assignee under a voluntary assignment, even at common law*, the right to resist the enforcement of a mortgage, valid as to the assignor, but void as to creditors, against the trust property.

If this is true, even as to a general assignee under a State Insolvency Law, or at common law, nominated by the insolvent debtor, it is, *a fortiori*, true of the Trustee in Bankruptcy selected by the *unsecured general creditors*, and being in contemplation of law, the creditors incarnate.

The case of *In re Rasmussen*, 136 Fed. 714, arising in Oregon, and which has been several times cited herein, was decided in 1905 prior to the 1910 Amendment of Section 47 (a) of the Bankruptcy Act giving the trustee the rights of a lien creditor as to property coming into his hands and the rights of a judgment creditor with an execution returned unsatisfied, as to property not coming into his hands. The Court did not, however, in that case hesitate to nullify the instrument at the instance of the trustee, though this trustee did not have the rights of a lien creditor or of an execution creditor.

The 1910 Amendment of Section 47 (a) was en-

acted to *extend* and *broaden* the powers of the trustee. The Appellant here is asking for a construction which would give to the 1910 Amendment the purpose and effect of *narrowing* the rights of the trustee, and the creditors represented by him.

If the trustee had the right to attack an invalid instrument before the 1910 Amendment to Section 47 (a), surely that right has not been diminished by that Amendment which evinces the intention of Congress to strengthen the trustee's position!

A most apposite statement with regard to the position of the trustee here will be found in the Second Edition of Remington on Bankruptcy, Sec. 1127 3-4, page 1064, in which that leading authority on the subject, says:

“Where the state law invalidates a transaction as against any existing creditor, whether armed with process or not, then the trustee will be subrogated to the right of any such existing creditor, regardless of the Amendment of 1910, arming him with process.”

The Appellant also loses sight of the fact that other sections of the Bankruptcy Act are to be considered in this connection. The importance of these sections and their bearing on this case are clearly pointed out in the thorough report of the Special Master (Transcript of Record, pp. 32-47.)

The Special Master calls attention to Section 70a (5) reading:



“The trustee \* \* \* shall be vested by operation of law with the title of the bankrupt to all \* \* \* (5) property which, prior to the filing of the petition, he could, by any means, have transferred, or which might have been levied upon and sold under judicial process against him.”

As to which Remington on Bankruptcy says:

“Chattel mortgages with power of sale are void as against the trustee if there is no agreement that the proceeds be applied on the debt, where such mortgages are held void as to the creditors by the law of the state.

“The goods which the chattel mortgage thus authorizes the bankrupt to sell must pass to the trustee under Sec. 70 as being property which the bankrupt might have transferred before the bankruptcy.”

Remington's statement in this regard is supported by *In re Rasmussen*, 136 Fed. 704, 706, where it is said with reference to this section:

“If the provision of the Bankruptcy Act which vests in the trustee property which prior to the filing of the petition the bankrupt ‘could by any means have transferred,’ is to have any application, it must operate to vest the property claimed in this case in the trustee.”

And Section 67a of the Bankruptcy Act reads as follows:

“Claims which, for want of record, or for other reasons, would not have been valid liens as against the claims of creditors of the bankrupt, shall not be liens against his estate.”

An instructive case completely answering the contention of the Appellant in this regard is that of *Mitchell vs. Mitchell*, 12 A. B. R. 389, in which the Court said with reference to a mortgage which was valid between the parties, but fraudulent as to creditors.

“The title attempted to be passed by such mortgage vests in such trustee. He stands in the shoes of the bankrupt, but *represents the creditors*, and is entitled to possession, and may bring an action to enforce his right of possession. He can maintain any action *either could maintain*. Such an action is not analogous to a creditor’s bill, and *it is no objection to it that the claims against the bankrupt are not in judgment*. The title is vested in him by operation of law. \* \* \* \* \*

It is argued that the mortgage in controversy being good as between the parties is also good as between the mortgagees and trustee in bankruptcy of the mortgagor; but *the rule is well settled that the trustee represents the rights of creditors*, and may attack conveyances made by the bankrupt in fraud of creditors. It is so provided in the statute. The trustee may prosecute any suit to recover assets in the hands of third parties, or to enforce the payment of claims that could have been prosecuted by the creditors themselves

had no proceedings in bankruptcy been instituted.” (*Italics ours.*)

The case of *Mitchell vs. Mitchell* was decided before the 1910 Amendment of Section 47 (a).

We quote again from the report of the Special Master in this regard: (Transcript of Record, p. 42.)

“I do not think it necessary for the trustee to plant his case upon this section (47a) but, if it were, the weight of authority is that it is not required there should be in fact creditors with the designated liens, but rather, that the trustee is deemed to have, and, in very truth, is invested with, the potential right of such creditors; the intendment is simply that his rights are to be measured by the rules of law applicable in the case of creditors who might have obtained these advantages. This must be so, for, as one authority puts it, ‘If the operation of the amendment is restricted to cases in which a creditor has in fact acquired a lien by legal or equitable proceedings, then it adds nothing to the law as it was under the original act?’

In re *Colhoun Supply Co.*, 26 A. B. R. 528, 189 Fed. 537.”

The learned Judge of the District Court below, in passing upon this contention of Appellant, said: (Transcript of Record, pp. 79-80.)

“It is also claimed the Trustee in Bank-

ruptcy is not in position to question the validity of this instrument. Prior to the Amendment of 1910 to the Bankruptcy Act the trustee was not clothed with the privilege of a judgment creditor, but to obviate this condition the amendment of 1910 was adopted, which was intended to vest in the trustee the same rights to attack secret unrecorded liens which were void under the state statute as was given to a judgment creditor under a state law. And under that provision of the Bankruptcy Act I take it that the Trustee in Bankruptcy is in position to question the validity of this mortgage, *which was void from the beginning*, and therefore the decision of the Referee in Bankruptcy will be affirmed."

## CONCLUSION.

In what the Appellant terms its "Conclusion," pages 26-27 of its Brief, it urges that it would be a "harsh law" which would defeat the bank's right to the proceeds of this property. If the rule is "harsh" as to the bank it was made so by the bank itself. That the bank was familiar with the equitable principle which prevents it from enabling Sondheim to hold his property free from the claims of creditors, by virtue of the existence of a chattel mortgage designed to enable him to retain the proceeds of his sales, without accounting or applying same in reduction of the mortgage, appears from internal evidence—the terms of the instrument in controversy.

Certainly the bank cannot call it a "harsh law" which gives the creditors the right to say to the bank after taking such an instrument, that it see to it vigilantly that as fast as sales are made by Sondheim the proceeds be accounted for and applied in reduction of the indebtedness to the bank.

As a matter of fact the instrument itself provides that Sondheim should pay over to the bank only *one-half* of the proceeds. What was to become of the other half? Naturally Sondheim could use it. In actual practice, however, he was not required to account even for one-half of the proceeds, but a convenient arrangement was entered into by which he might pay the bank \$500 per week, though his sales might have run into the thousands, and yet if the bank's view be correct, it would be a "harsh law" which would permit the creditors to object to any such arrangement!

That the course of conduct of the bank and Sondheim in this matter, irrespective of the bank's contentions, constituted a fraud upon the rights of creditors is not open to doubt; that the Oregon law which governs in the matter as expounded in the decisions of the Supreme Court of the State of Oregon denounces such a transaction as fraudulent *per se* is not open to doubt; that under this course of decisions the objection to the validity of such an instrument can be raised by an assignee or trustee representing the general creditors, is not open to doubt; that a trustee in bankruptcy has, under the Bankruptcy Law, rights equal to the assignee, a common law is not open to doubt.

We respectfully submit that it must therefore be concluded that the proceeds of the sale of the property



involved is a part of the general estate of the bankrupt in which the bank must share along with other creditors, without preference or priority. Such was the view of the Special Master, and such was the view of the learned Judge of the lower court.

We respectfully commend to the attention of this Court the scholarly and exhaustive opinion of Special Master A. M. Cannon, Esq., set out in extenso in the Transcript of Record, at pages 32-47, and bearing internal evidence of intelligent, careful, conscientious investigation and deliberation. Every phase of the matter was so thoroughly covered in the Master's report that Mr. Justice Bean, approving same, deemed it unnecessary to discuss at length the questions involved, and contented himself with a brief incisive statement of his conclusions.

Respectfully submitted,

SIDNEY TEISER,

ROSCOE C. NELSON,

Attorneys for Trustee and Appellee.

IN THE  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

SCANDINAVIAN-AMERICAN BANK,  
 a corporation,  
 Petitioner and Appellant.

vs.

R. L. SABIN, Trustee of the Estate  
 of D. Sondheim, Bankrupt,  
 Trustee and Respondent.

In the Matter of D. Sondheim, Bankrupt.

**REPLY BRIEF OF PETITIONER  
 AND APPELLANT**

Petition for revision of and appeal from a certain order  
 and judgment of the United States District  
 Court for the District of Oregon.

SIDNEY J. GRAHAM,  
 Attorney for Petitioner and Appellant.

SIDNEY TEISER,  
 ROSCOE C. NELSON,  
 Attorneys for Trustee and Respondent.

Filed

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F. D. Monckton,



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In his effort to support the decree of the District Court appellee, to say the least, indulges in very extravagant language and is responsible for statements concerning the position of the appellant, the facts of this case and the law applicable thereto, that are wholly unwarranted.

He charges the appellant with inconsistency. He says that the instrument, according to appellant, is "surely a chattel mortgage." The appellant has never

contended that the instrument amounted in effect to a chattel mortgage and no one knows this better than appellee, nor has the appellant amended its position from time to time after the abandonment of other equally ingenious and equally unsound contentions as appellee declares.

The appellant contended from the first, and now contends, first, that the title to the merchandise was in the bank, and therefore, that the agreement between the parties constituted a contract of conditional sale, or in any event, established such a trust relation that under the authority of *In Re Cattus* and like cases, it was entitled to hold the merchandise until its advances were repaid.

2. That accepting for the sake of argument, appellee's contention that the agreement amounted in effect to a chattel mortgage, it was valid under the laws of the State of Oregon and not void as contended by appellee.

3. That the appellee was without authority to maintain the proceeding. We, therefore, fail to see the occasion for appellee's charge of inconsistency.

In our brief we discussed this case under three main divisions. Adopting the same arrangement, we will answer the contentions of the appellee.



## I.

*Under the terms of the agreement, the title to the merchandise remained in the Bank.*

Discussing this point the appellee says that under the authority of the decision of the District Court *In re Rasmussen's Estate*, 136 Fed. 704, and *In re Roellich*, 223 Fed. 687, that it is clear that in Oregon at least, such an arrangement is void as to creditors whether it is called a conditional sale, mortgage, contract, trust or by whatever nomenclature the ingenuity of counsel may devise. Elsewhere in his brief he also calls attention to the decisions of the District Court in these cases, and he places much reliance thereon. These were cases decided by the District Court. In each instance they involve a state of facts not similar to the facts of the instant case, as an examination of the opinions will disclose. Furthermore, the Circuit Court of Appeals, for the Eighth Circuit, has expressly condemned the doctrine of the *Rasmussen* case.

In *Dunlop v. Mercer*, 156 Fed. Rep. 549, in a case before Sanborn and Van Devanter, Circuit Judges, and Phillips, District Judge, Justice Sanborn in rendering the opinion of the Court, among other things says:

“The next contention of counsel for the Trustees of the Western Company is that the agreement was fraudulent and voidable against the trustees, because it permitted the conditional vendor to sell the merchandise in the regular course of busi-

ness, but provided that the proceeds should be credited upon its notes and accounts, or held as collateral security therefor, and because it was not filed or recorded in due time in any public office; and they cite authorities from New York, Illinois, and Oregon, which sustain that position. In *re Garcewich* (N. Y.), 115 Fed. 87, 53 C. C. A. 510; In *re Carpenter* (D. C. N. Y.), 125 Fed. 831; In *re Galt* (D. C. Ill.), 120 Fed. 443; In *re Rodgers* (Ill.), 125 Fed. 169, 177, 60 C. C. A. 567; In *re Rasmussen's Estate* (D. C. Or.), 136 Fed. 704, 706. But the general rule and the weight of authority in this country, the established rule of property in Minnesota, and the established rule in this court are otherwise."

It is thus seen that the Circuit Court of Appeals declares that the general rule and weight of authority in this country, the established rule of property in Minnesota, and the established rule of that court are opposed to the decision of District Judge Bellinger. But in any event, in both the *Rasmussen* and *Roellich* cases, the Trustee had possession of the property. In this case it is admitted that the bank had possession of the property and the appellee overlooks this important distinction.

In his argument under this point he also calls the attention of the court to the testimony of the cashier of the bank. We invite the court's attention to this testimony too. We ask that the court read the entire testimony. It is to be found on pages 50-66, inclusive, of the Transcript of Record. It is not impeached in

any particular and it is all the testimony adduced at the hearing before the Special Master. It clearly shows that the understanding and intention of the parties was that the title to the merchandise was to be in the bank. The Trustee is bound by this testimony. He cannot assume any other or different facts. He did not call a single witness to question this testimony and he cannot question it now. It is true, he argues, that Sondheim had unlimited power to dispose of the merchandise, and that there was no restriction of any character imposed upon his utilization of the proceeds, but the record contradicts this. Under the terms of the agreement, Sondheim was required to apply one-half of the proceeds realized from the daily sales to the reduction of the indebtedness, and as a matter of convenience and to save the bank bookkeeping, this was modified so that he was required to make weekly payments of \$500.00. He deposited the proceeds realized from the sales of these goods in the bank, and in the event that he did not make the weekly payments agreed upon, his checking account was to be charged, and it was charged once in the sum of \$365.00 and once in the sum of \$195.00, and because he failed to make the agreed payments, possession of the merchandise was taken. The undisputed, unquestioned testimony shows this to be the fact. Appellee is, therefore, mistaken when he says that Sondheim had unlimited power to dispose of the merchandise, and that there was no restriction of any character imposed upon his utilization of the proceeds.

Appellee also argues that neither the statutes of Oregon or the decisions of that State countenance any such

thing as a "trust" by which a man can do business in his own name, deal in a shifting stock of goods, use the proceeds as he sees fit, and when his creditors seek to have his assets applied to the payment of his debts, claim immunity from attack by virtue of the secret existence of an unrecorded agreement in the execution of which the debtor has then been left in uncontrolled possession and use of his assets. This is beside the point. Sondheim is not claiming immunity from attack by reason of this agreement. The bank, as a vigilant creditor, with a bona fide obligation, is asserting its claim. It is not sought to divert this property to Sondheim but it is sought to have it applied to the reduction of a bona fide claim.

In this connection, appellee also says that it is believed the court will be at least equally interested in the manner in which the transaction was actually carried out as in the language of the agreement. We have not confined ourselves simply to a discussion of the language of the agreement. We say that the language of the agreement, construed in the light of the conduct of the parties, is clear. We submit that an examination of the acts of the parties will not instantly condemn the agreement as in its nature essentially and necessarily a fraud upon the creditors, as appellee declares. During the time that Sondheim was in possession, nothing prevented his creditors from levying attachments. They were not vigilant to protect their interests. The bank was. Within three weeks after the execution of this agreement, the bank had taken possession of the property, and all through the consideration of this case it



must be remembered that Sondheim's possessions were increased by the bank, not diminished. It appears that all of this money was money used by Sondheim for different purchases of merchandise. It is admitted that \$2600.00 was used to purchase the stock of merchandise in question, and the cashier of the bank testified as follows concerning the remaining sum of \$2600.00:

"At that time he owed us \$2600.00 on three different notes. From time to time we advanced Sondheim money for different purchases, and at this particular time he owed us \$2600.00 besides the \$2600.00 advanced him on that day. (Transcript of Record, page 52.)

Speaking of such a transaction, Mr. Black in his work on bankruptcy, at page 807, says:

"Where a bank or an individual advances money to a merchant to enable him to buy or import a stock of goods, and the merchant executes a trust receipt, by which he agrees to hold the goods in trust for the one so advancing the funds and as the latter's property, but with liberty to sell the same in the course of trade and binding him to pay over the proceeds of such sales as fast as received until the advances are repaid, the title to the goods before repayment does not vest in the merchant in such sense that they will be assets of his estate in bankruptcy, but the cestui que trust will be entitled to reclaim the goods from the trustee in bankruptcy, or the proceeds if sold."



The record shows that the bank advanced the money to enable Sondheim to make the purchase of the stock of merchandise. It shows that he executed a trust receipt. It shows that he understood and the bank understood that the title to the merchandise was to be in the bank until the indebtedness was repaid. The agreement itself, which is in evidence, recites:

“It is understood and agreed between the parties hereto that the goods, wares and merchandise heretofore named were purchased with the money furnished by the party of the second part, and that said D. Sondheim holds title in the same as Trustee for the said party of the second part in so far as the holding of said title is necessary to protect and pay back to the party of the second part the sums of money owing by the party of the first part to the party of the second part.”

The testimony of the cashier of the bank shows that payments were made on the indebtedness and that provision was made for the repayment of the entire sum owing the bank within a period of less than eleven weeks. It shows further that the agent of Mr. Sondheim in charge of the stock of merchandise, acknowledged the right of the bank to possession thereof. This was brought out by appellee on the cross-examination of Mr. Eckern. The particular questions and answers are as follows:

“Q. While ago when I was trying to

make a statement of the facts, I made the statement that you had taken charge of the place on the 13th of November and was interrupted with the correction that someone from that place came up and surrendered the stock to you, not that you took possession; who was it surrendered that stock to you on that day; what was the reason for that correction?

A. We talked with Nudleman, the man who had charge of the store before we attempted to do this, and he said to us that we could take charge of it at any time we desired.

Q. Did he tell you why?

A. He knew that money was coming to us, that Sondheim owed us money on the stock and when we said that we thought it best to take possession ourselves he made no objection; in fact he said he knew we had a right to take it.

Q. And you sent your man over there on the 13th and took charge?

A. Yes." (Transcript of Record, pages 64-65.)

Under these circumstances the title to the merchandise did not vest in the trustee in such sense that the merchandise can be claimed as part of the bankrupt estate.

## II.

*Considered as a chattel mortgage, the agreement is valid under the laws of the State of Oregon.*

The Special Master found that the agreement between the bank and Sondheim amounted in effect to a chattel mortgage and was void under the laws of the State of Oregon. The District Court overruled our exception to this finding. We contended then, and contend now, that the agreement does not amount in effect to a chattel mortgage. The language of the agreement considered in connection with the testimony of the cashier of the bank is clear. The title to the merchandise was to be in the bank, and if the title was in the bank the instrument clearly could not be a chattel mortgage. The testimony is clear and plain on this point. Mr. Eckern says:

“That the stock would be considered as ours and handled for us.” (Transcript of Record, page 51.)

And again:

“Mr. Sondheim said that we would have the title but he wanted to handle the goods, to look after the managing part of it.” (Transcript of Record, page 51.)

And again:

“After we were paid \$5200.00 then he would *get the title back* to the stock and we would have nothing to do with it. That was the understanding.” (Transcript of Record, page 51.)

And again:

“Our understanding was that the stock would be in our name, that we would own title to it until we were paid.” (Transcript of Record, page 60.)

But even if the instrument could be held to amount in effect to a chattel mortgage it is valid under the laws of the State of Oregon. Accepting, for the sake of argument, the assumption of the appellee that the instrument is a chattel mortgage, his second assumption that it is void under the laws of the State of Oregon, is even more erroneous than his first assumption. The instrument considered as a chattel mortgage is not void under the laws of the State of Oregon. Appellee's chief objections to the instrument considered as a chattel mortgage are first, that it was not recorded, and second, that it permitted Sondheim to remain in possession of the merchandise, selling it in the usual course of business without accounting to the bank. The first objection is expressly overcome by the evidence that the agreement was entered into in good faith, for a valuable consideration and without any intent to defraud creditors, and the findings of the Special Master to the same effect. As we pointed out in the brief we first filed, at

pages 18 and 19, the failure to record a chattel mortgage raises a presumption of fraud which is overcome by evidence that the mortgage is executed in good faith and for a valuable consideration.

Subdivision 40 of Sec. 799, Lord's Oregon Laws, expressly makes the presumption from the failure to record, or from the failure to deliver possession, a disputable one, and in construing the section the Supreme Court of Oregon has construed it to mean just what it says:

In *Marks vs. Miller*, 21 Ore. 317, the court says:

"Hence, a chattel mortgage under our statute, given in good faith, although not filed, is valid as against creditors and subsequent purchasers . . . . It is true in the earlier decisions the presumption of fraud from possession was held to be conclusive, but the later and better considered cases hold that the fact of possession by the mortgagor is only prima facie a badge of fraud; that it may be rebutted by explanation showing the transaction to be fair and honest and consistent with the terms of the contract; and that the presumption of fraud arising from the circumstances of such possession is not an absolute inference of law but one of fact for a jury."

In *Davis vs. Bowman*, 25 Ore. 189, 35 Pac. 264, the court says:

"As to such mortgages, not recorded or filed, there is a presumption of fraud



which, unexplained, leaves them invalid, but which when explained, removes such presumption and leaves them intact and valid."

The objection that the instrument was not recorded is also overcome for another reason—the bank took possession of the property; and while on this point it may be well to answer certain assertions of the appellee concerning this possession. The appellee in his brief intimates that the bank never had a sufficient possession of the property. This intimation is unwarranted. Paragraph III of appellee's petition contains this allegation:

"That under which said mortgage the said bank took possession of said stock at 4 o'clock on the afternoon of Friday, November 13, 1914." (Page 12, Transcript of Record.)

The finding of the Special Master is as follows:

"Before, however, this store could be taken into custodia legis, respondent bank, becoming apprised of the situation, entered the store, took possession and placed in charge one Eftland as agent or representative. This was upon the same day, and but a few hours before, the attempt to levy the attachment was made. Consequently, no levy could be made of the writ and this store was at no time levied upon." (Transcript of Record, page 35.)

The stipulation between the parties is as follows:

“That an attempt was made to levy on the stock in question but that the same could not be levied because at a previous hour on the same day the agent of D. Sondheim, previously in charge of same, had surrendered the stock to the Scandinavian-American Bank.” (Transcript of Record, page 48.)

The testimony of the cashier of the bank is as follows:

“Q. State whether or not you had possession of this stock of goods at the time the attempted levy was made.

A. We had.” (Transcript of Record, page 55.)

And again, referring to a conversation with the agent of D. Sondheim in charge of the store, he says:

“A. We talked with Nudleman, the man who had charge of the store before we attempted to do this, and he said to us that we could take charge of it at any time we desired.

Q. Did he tell you why?

A. He knew that money was coming to us, that Sondheim owed us money on the stock and when we said that we thought it best to take possession ourselves he made

no objection; in fact he said he knew we had a right to take it.

Q. And you sent your man over there on the 13th and took charge?

A. Yes." (Transcript of Record, pages 64-65.)

Appellee's petition further alleges:

"That said bank has refused to deliver possession of said stock although demand has been made upon it for the same."  
(Paragraph VII, Transcript, page 13.)

Also in Paragraph X:

"That the said bank is now selling the said stock at retail." (Transcript, page 13.)

This sufficiently shows that there is no basis for appellee's assertion that the possession of the bank was not open, exclusive or notorious, or that it was not taken and continued so as to give its possession these attributes. If the bank did not have the open, exclusive and notorious possession of the merchandise, why did the Special Master find that the Bank was in possession of the merchandise and that consequently a levy of the writ of attachment could not be made and that the store was at no time levied upon? If the Bank did not have possession of the merchandise why did the appellee al-

lege that it took possession of said stock Friday, November 13, 1914, at 4 o'clock p. m. and that it refused to surrender possession and that it was selling the stock at retail. If the Bank did not continue in the open, notorious and exclusive possession of the merchandise why did the appellee apply to the District Court for an order restraining the Bank from selling the merchandise at retail and why in fact did an order of the District Court issue restraining the Bank, its servants, agents and employees, no other party, from disposing of the merchandise pending the determination of the court as to its ownership? Appellee's brief is filled with just such unwarranted assertions. We can conceive of no reason why he should not be bound by his pleadings, by his stipulations and by the uncontradicted testimony.

In view of the fact that Efteland was placed in charge of the merchandise by the Bank as its agent, the following excerpt from the opinion of Mr. Chief Justice Lord in *In Re Fisher*, 25 Ore. 67, is very pertinent:

"We may premise that it is not necessary that the mortgaged goods must be delivered to the mortgagee in person, but that delivery to a third party as his agent is equally effective as constituting an actual change of possession. In the case at bar, neither the mortgagor nor his clerk was left in the possession of the goods as agent for the mortgagees, but a third party, as their agent, took possession of such goods, and remained in the continued possession of the same until ousted by the sheriff under the attachment proceedings. There is a marked difference, as in-

dicating a change in the possession of the property, between a mortgagee, or a third party as his agent, taking possession of mortgaged goods, and such mortgagee leaving the same in the possession of the mortgagor or his clerk as such agent. In the nature of things, when there has been delivery of the mortgaged goods, and an acceptance of them by a third party as such agent, his possession, so long as it continues, is actual and exclusive for the mortgagee. Nor is it necessary that there should be any removal of the goods to indicate such change of possession; for the taking of possession and assuming control over the property by such agent is an outward act, or visible sign, of an actual change of possession."

Appellee also asserts at page 23 of his brief that after the bank had become apprised of the fact that suits had been instituted by creditors and attachments issued, a few hours before the levy of attachment was made, it placed a man named Efteland in charge of the stock.

There is no testimony in the record to support this assertion. There is no evidence that the bank knew that any suits had been instituted and writs of attachment issued. As a matter of practice appellee knows that neither the sheriff or the clerk of the Circuit Court publish such information until the attachments actually have been levied. It is true that the Special Master in his report, Transcript, p. 35, says:

"On November 13, 1914, actions were



brought by creditors against Sondheim and writs of attachment issued against his several mercantile establishments, the one in controversy among others. Before, however, the store could be taken in the custodia of legis, the respondent bank becoming advised of the situation entered the store, took possession and placed in charge one Eftland, as agent or representative."

This language is ambiguous without a resort to the evidence. It then becomes clear that it is not intended to amount to a statement that the bank knew that suits had been instituted and attachments issued for the uncontradicted testimony discloses that the bank took possession of the merchandise because Sondheim could not be found and had not made the payments as he promised. Transcript of Record, testimony of Anthon Eckern, pp. 55, 63, 64, 65. If the bank knew that suits had been instituted and attachments issued and for that reason took possession of the merchandise appellee has not produced any witness to so testify and in the absence of any testimony to that effect his assertion is not warranted.

This answers appellee's assertions concerning the nature of the possession of the bank and the reason therefore. Returning now to the point that the possession of the bank dispensed with the necessity to record the agreement, if it be considered as a chattel mortgage, Jones in his work on chattel mortgages has this to say:

"If a mortgagee takes possession of the mortgaged chattels before any other right

or lien attaches, his title under the mortgage is good against everybody. If it was previously valid between the parties although it be not acknowledged and recorded or the record be ineffectual by reason of any irregularity, the subsequent delivery cures all such defects and it also cures any defect there may be through an insufficient description of the property. The delivery of possession under a mortgage before rights have been acquired by others will cure any invalidity there may be in the instrument whether arising from an insufficient description of the property and insufficient execution of the instrument, the omission to record it, or from its containing a provision which makes it void except as between the parties, as for instance an agreement that the mortgagor may retain possession and sell a stock of goods in the usual course of trade."

The statement of the author is in accord with the great weight of authority. Appellee declares, however, that the possession that will obviate the necessity for record must be an immediate one. He says:

"The Oregon statutes in both instances precisely and explicitly declare that the only change of possession which applies is the 'immediate' change, i. e., one made promptly upon the execution and delivery of the instrument. The failure to record, therefore, was not cured by this belated taking of possession." (Appellee's Brief, page 24.)

In support of this remarkable doctrine he cites *Pierce*

vs. Kelly, 25 Ore. 95. This case is not authority for his contention. It was a case which turned largely upon the question of whether or not there had been a sufficient delivery of the mortgaged property to the plaintiff who was an employee of the mortgagor. Nowhere in the opinion of the court is it even intimated that the change of possession must be an immediate one to remove the presumption raised by the statute and that this is true is very apparent from the language of Mr. Chief Justice Bean in a later case construing the same statute. He says in *Rule vs. Bolles*, 27 Ore. 368:

“The retention by the vendor of the possession of personal property capable of immediate delivery raises only a presumption of fraud, but this presumption continues *no longer than the property remains in the possession of the vendor*; and if, as the jury found, the possession of the horses in dispute had been delivered to, and they were under the supervision and control of, the plaintiff, at the time the defendant attached them, there was no room for the application of the rule referred to.”

It is clear under the authority of this decision that the presumption of fraud raised by the statute by reason of the failure to record the agreement or to deliver immediate possession continued no longer than the property remained in the possession of Mr. Sondheim and that the moment that the bank took possession of the property the presumption ceased. This is no more than the express language of the statute itself declares. It says “creates a presumption of fraud as against the

creditors of the seller or assignor, *during his possession.*” Accordingly, the objection that the instrument was not recorded is entirely overcome, first because the instrument was executed in good faith and for a valuable consideration, and second, because the possession of the bank dispensed with the necessity of record.

Appellee’s second objection is the one to which he attaches the most importance. He says that under the authority of *Orton vs. Orton* and like cases, the agreement is clearly void because it permitted Sondheim to remain in possession of the merchandise, selling it at retail without accounting for the proceeds. A proper consideration of this objection necessitates consideration of the testimony adduced at the hearing before the Special Master. As we have heretofore pointed out, Sondheim did not have unlimited power to dispose of the merchandise and restrictions were placed upon his utilization of the proceeds. The agreement provided for a payment of one-half the proceeds realized from the daily sales. The agreement further provided that no sale of the goods in bulk could be made without the consent of the bank. The testimony discloses that the requirement that one-half of the proceeds of the daily sales be applied to the indebtedness, was modified in order to save bookkeeping, and that in lieu thereof, Sondheim agreed to make weekly payments of \$500.00, and consented, in the event that the weekly payments were not made, that his checking account should be charged therewith. The evidence shows that he deposited all the proceeds realized from daily sales in this bank. The evidence discloses that he made the first weekly payment of



\$500.00, and that the second week his checking account was charged with the sum of \$365.00, and that the third week his account was charged in the sum of \$195.00, and possession of the merchandise taken by the bank. It is seen, therefore, that provision was made for the repayment of the entire indebtedness within a period of less than eleven weeks, and that payments were actually made, and that because the required payments were not made, that the bank took possession of the merchandise.

Now because the parties did not provide for the payment of all the proceeds realized from the daily sales, the appellee contends that the agreement is void notwithstanding that it was executed in good faith, and without any intent to defraud creditors. To support this contention he relies upon *Orton vs. Orton*, 7 Ore. 748, and like cases.

In each instance these early cases held the mortgage void for the reason stated by Mr. Justice Moore in *Fisher vs. Kelly*, 30 Ore. 1: "It is for the mortgagor's own use and benefit." Thus in *Orton vs. Orton*, 7 Ore. 478, the court says:

"The evidence proves that after the execution of the first mortgage Iri Orton permitted his son M. W. Orton, the mortgagor, to sell the mortgaged goods which was a stock of merchandise and apply the proceeds to his own use."

So too in *Bremer vs. Fleckstein*, 9 Ore. 274, the court says: "We find the mortgagor in reality under no more restraint than if the mortgage had not been



given." Also in *Aiken vs. Pascall*, 19 Ore. 493, cited by the appellee, the court says, in addition to calling attention to the fact that the transaction was permeated with actual fraud, that the mortgagor applied the proceeds to his own use. In none of the cases relied upon by appellee did the mortgagor pay any of the proceeds realized from the daily sales to the mortgagee to apply on the mortgage debt. Herein lies the vital distinction between the present case and the cases relied upon by appellee. In the instant case provision was made for the payment of one-half of the proceeds realized from the daily sales. In practice in order to save bookkeeping Sondheim agreed to pay a lump sum of \$500.00 each week. By this provision for the payment of \$500.00 each week, the agreement clearly became one for the benefit of the bank and not one for the benefit of Sondheim. Without this requirement of weekly payments, the agreement considered as a chattel mortgage, clearly would be one for the benefit of the mortgagor and the reason for holding it void against attaching creditors would be apparent. The validity or invalidity of a chattel mortgage under these decisions is to be determined in each instance by an inquiry into whether it is for the benefit of the mortgagor or for the benefit of the mortgagee. Clearly if the mortgagor retains possession of the mortgaged property selling it at retail without making any payments upon the mortgaged indebtedness, the mortgage is invalid against attaching creditors for the reason that it is for his benefit. On the other hand if the mortgagor retains possession of the mortgaged property, selling it at retail and provision

is made for weekly payments which will extinguish the indebtedness within a reasonable time the mortgage is clearly one for the benefit of the mortgagee and is valid.

This is the reasoning of the Supreme Court of Oregon in *Currie vs. Bowman*, 25 Ore. 364, and *Sabin vs. Wilkins*, 31 Ore. 450. Appellee seeks to disparage the effect of the decision in the case first mentioned by remarking, "just what aid or comfort appellant gathers from that decision is not apparent." He overlooks this very pertinent language of Mr. Chief Justice Lord:

"It is only when the mortgage is given and received with the intent to hinder and defraud creditors that it is void and not when it is taken by the mortgagee for the honest purpose of securing a valid claim or indebtedness."

He fails to take into consideration this further observation of Mr. Chief Justice Lord in the same case:

"A debtor has the right to secure a creditor and if he does so by giving a mortgage, it is what the law admits to be rightful, although the effect will be to hinder other creditors, and he so intends; yet if such mortgage is accepted in good faith it is not a fraudulent hindrance, because the debtor has not disposed of his property in a way to prevent its application to the satisfaction of his bona fide debts. *Sabin vs. Fuel Co. (Or.)*, 35 Pac. 694."

Appellee also would insist that *Sabin vs. Wilkins*,

31 Ore. 450, is not in point but an examination of the opinion in that case rendered by Mr. Justice Wolverton, will show that it is very much in point. In reviewing the early decisions of the Supreme Court of Oregon he says:

“It has been decided in this state that when it appears either upon the face of the mortgage or by parol evidence aliunde that the mortgagee of personal property has given the mortgagor unlimited power and authority to dispose of the property in the usual course of trade, for his own use and benefit, the mortgage is void as to attaching creditors.”

It is proper to note that he says a mortgage which is for the mortgagor's own use and benefit is void, and furthermore, that the class to which it is void is attaching creditors. He then states that the creditors can only complain when the mortgage is used as a shield for the special benefit of the mortgagor and that it is the erection of a false muniment not intended to secure the mortgagee so much as to ward off and defeat just demands that works the iniquity and to avoid which the law affords a remedy.

These decisions leave no doubt as to the validity of the agreement considered as a chattel mortgage. But argues the appellee a mortgage which does not provide for the payment to the mortgagee of all the proceeds realized from daily sales is one exclusively for the benefit of the mortgagor, and therefore void. This does not follow. Each case must stand upon its own facts. The

Supreme Court of Oregon has never declared any such doctrine to be the law and as said by the Supreme Court of the United States in *Etheridge vs. Sperry*, "the question is not one of law so much as it is one of fact and good faith," and in this case the Special Master expressly found that the bank entered into the contract with Sondheim in good faith and with no actual intent upon its part to hinder, delay or defraud creditors. In the light of the decisions of the Supreme Court of Oregon, under the admitted facts of the instant case, it is clear that considered as a chattel mortgage the agreement was one for the benefit of the bank and valid.

In this connection the decision of the Supreme Court of Alabama, in *Adkins vs. Bynum*, 109 Ala. 281, emphasizes a distinction that should be given consideration. The court in that case said that while constructive fraud is imputed to a transaction by which a mortgagor retains possession of mortgaged property, selling it at retail for his own use and benefit, that constructive fraud cannot be imputed to a transaction where the mortgagee has furnished the property to the mortgagor, and the mortgagor is holding the property as security to repay the mortgagee, even though he sells it at retail for his own use and benefit. In its opinion the court says its attention has not been called to any decision pointing out this distinction, but, continues the court, it is one that should be made. The court sums the matter up in these words:

"So that in any view, the creditor loses nothing and cannot be hurt by such a



transaction, and he may well be substantially benefited."

(c) *Possession of mortgaged property by a mortgagor under an unrecorded chattel mortgage before the lien of any creditor attaches, makes such a mortgage good against every one.*

The Scandinavian-American Bank had possession of the merchandise in controversy before the lien of any creditor attached, and before the proceedings in involuntary bankruptcy were instituted. If, for any reason, the agreement considered as a chattel mortgage could be said to be invalid against creditors this possession of the bank cured all defects and made it valid and binding. We refer the court again to the authorities which we cited in the brief which we first filed which are found under this point on pages 20, 21 and 22.

The appellee calls the attention of the court to the decision of the District Court of Oregon in Schaupp vs. Miller, 206 Fed. Rep. 575, as announcing a contrary doctrine. It will be observed in that case that the bankrupt was permitted by the mortgagee to continue in possession of the goods and sell them at retail in the usual course of business without paying any of the proceeds on the mortgage indebtedness. It will further be observed that Mr. Justice Bean says mortgages of that character are void in Oregon for the reason stated by Mr. Justice Moore in Fisher vs. Kelly, 30 Ore. 1, "It is for the mortgagor's own use and benefit," and also that there is no authoritative ruling by the Supreme Court of Oregon on the effect of possession. It is true



that he holds that possession does not validate the mortgage, but the question has never been passed upon by this court and in the absence of any decision to the contrary by the Supreme Court of the State of Oregon, we submit that the better rule, both upon reason and authority, is that possession before the lien of any creditor attaches, cures any invalidity.

Etheridge vs. Sperry, 139 U. S. 277.

Johansen Bros. Shoe Co. vs. Alles, 197 Fed. 274.

In re Marengo County Mercantile Co., 199 Fed. 480-481.

In re Harnden, 200 Fed. 177-178.

Garner vs. Wright, Ark. 6 L. R. A. 715.

Noyes et al. vs. A. E. Ross (Mont.), 47 L. R. A. 400.

Read et al. vs. Wilson, 22 Ill. 380.

First National Bank of Fergus Falls vs. Michael 24 Minn. 436.

Cameron vs. Marvin, 26 Kan. 612.

Francisco et al. vs. Ryan, 34 Ohio St. 307.

In re First National Bank of Canton, Ohio, C. C. A. 6th Circuit, 135 Fed. 62.

Thompson vs. Fairbanks, 196 U. S. 516.

Humphrey vs. Tatman, 198 U. S. 94.

Hauselt vs. Harrison, 105 U. S. 405.

The decision of the Circuit Court of Appeals for the Eighth Circuit, in Johansen Bros. Shoe Co. vs. Alles, 197 Fed. 274, will be found squarely in point. The statutes of the State of Missouri with reference to the

validity of chattel mortgages are similar to the statutes of the State of Oregon. The case is a recent one.

Likewise in *Cameron vs. Martin*, 26 Kansas 612, the Supreme Court of Kansas goes carefully into the question of the effect of possession by a mortgagee. This was a case where the plaintiffs claimed the property by virtue of four chattel mortgages which were never recorded, and they did not take possession of the property until long after the mortgages were executed. Nine days after such possession was taken, the defendants issued a writ of attachment against the mortgagor and levied it upon the property. The court held that the mortgages were valid from the time the mortgagees acquired possession of the property covered by the mortgages.

Mr. Justice Valentine, in delivering the opinion of the court, observed:

“We now come to the question, would the mortgage become valid when the plaintiffs took possession of the property under them? We think we must answer this question in the affirmative. (*Dayton vs. Savings Bank*, 23 Kan. 421; *Savings Bank vs. Sargent*, 20 Kan. 576; *Nash vs. Norment*, 5 Mo. App. 545; *Eastman vs. Water Power Co.*, 24 Minn. 437; *Reed vs. Wilson*, 22 Ill. 377; *Frank vs. Minor*, 50 Ill. 444; *Chipron vs. Feikert*, 68 Ill. 284; *McTaggart vs. Rose*, 14 Ind. 230; *Brown vs. Platt*, 8 Bosw. (N. Y.), 324; *Brown vs. Webb*, 20 O. 389; *Chapman vs. Weimer*, 4 Ohio St. 481; *Field vs. Baker*, 12 Blatch (U. S. 438.)”

After quoting section 178, Jones on Chattel Mortgages, to the effect that possession cures any invalidity there may be in the instrument, or from its containing a provision which makes it void as between the parties, the opinion continues:

“This statement of the law is undoubtedly in accordance with the great weight of authority . . . Of course, a chattel mortgage for property not delivered is void as against all creditors who have no notice of the mortgage, but they have no right to, or interest in any specific property until they have obtained this right or interest by some legal process. They have no more right to the property than the mortgagee has, whose mortgage is void. They all have an equal right to the property, that is, they all have a right to procure a lien upon it, or an interest in it by virtue of legal process or chattel mortgage or purchase; and the one who first acts will obtain the prior right in and to the property. If one of the creditors already has a chattel mortgage upon the property he may file his mortgage or procure possession of the property, and if he has done this with the consent of the mortgagor, he has certainly obtained the prior right to the property.”

In *Wilson vs. Leslie*, 20 Ohio, 161, under a statute which declared that every mortgage upon chattels which shall not be accompanied by *immediate* delivery and be followed by an actual and continued change of possession, shall be absolutely void as against creditors, subsequent purchasers and mortgagees in good faith, unless

the mortgage shall be forthwith deposited as directed in the succeeding section of the act, the Supreme Court of Ohio said:

“A fair construction of this statute will not make the instrument inoperative as between the parties although it be not forthwith deposited with the recorder . . . The mere fact that the mortgagee omitted for several days or weeks to deposit his mortgage with the clerk of the township or recorder of the county as the case might require, would by no means render his security void. It would not be void against that class of creditors who were equally remiss with the mortgagee and took no steps to fasten upon the property for the payment of their debts.”

In *Forrester vs. Kearney National Bank*, the Supreme Court of Nebraska declares that possession by a mortgagee before the right or lien of any third party attaches, makes the mortgage good against everybody.

In *Francisco et al. vs. Ryan*, the Supreme Court of Ohio had under consideration a mortgage which permitted a mortgagor to remain in possession of a stock of merchandise with a power of sale. The court held that such a mortgage was ineffectual to create a lien as against creditors of the mortgagor who asserted their rights against the property while it remained under his control, but that it was valid as between the parties, and when the mortgagee took possession, the property was not longer subject to legal process issued against the mortgagor or liability for his debts, except to the extent

of any surplus that might remain after the satisfaction of the mortgage debt and proper charges for enforcing the same.

It is clearly apparent under the authority of this case and like cases that even if this court should be of the opinion that the agreement between the Scandinavian-American Bank and D. Sondheim constituted a chattel mortgage and was void because he did not pay all the proceeds to the bank, that the fact that the bank secured possession before the lien of any creditor attached, entitled it to hold the property.

The case, however, which we deem decisive of this question is *Hauselt vs. Harrison*, 105 U. S. 405. This was a case where the defendant, Harrison, entered into an agreement with one Edward Bayer by which he advanced certain moneys to Bayer for the purchase of veal and kip skins, under a provision that all the skins should be considered a security for the advances. The agreement was not acknowledged, nor was it recorded, and plaintiff as assignee in bankruptcy of Bayer, sought to recover skins which the defendant had taken possession of. The Supreme Court says:

“It was decided in *Gregory vs. Morrison*, 96 U. S. 619, that the legal effect of such a contract is to create a charge upon the property, not in the nature of a pledge, but of a mortgage. Such a lien is good between the parties without a change of possession even though void as against subsequent purchasers in good faith without notice, and creditors levying executions or attachments.



*And if followed by a delivery of possession before the rights of third persons have intervened, it is good absolutely."*

The court then proceeds to say that the equitable lien created by the arrangement between the defendant and Bayer was one capable of enforcement, and reversed the decision of the lower court and confirmed the defendant in his possession of the property.

The Scandinavian-American Bank enabled Sondheim to make the purchase of this merchandise. It secured possession before the rights of third persons intervened. The trustee is not a subsequent purchaser in good faith, without notice, and no creditors effected a levy of executions or attachments prior to the possession of the bank. Under the authority of this decision alone, the decree of the District Court should be reversed.

*(d) Even without a change of possession, an unrecorded mortgage given in good faith is good against every one but subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property.*

Appellee has failed to make any sufficient answer to this contention. Section 4707 Lord's Oregon Laws provides in substance that every chattel mortgage which shall not be accompanied by immediate change of possession, or which shall not be recorded, shall be void as against subsequent purchasers and mortgagees in good faith and for a valuable consideration. The statute does not say that such a mortgage shall be void against all

creditors. Its operation is limited to subsequent purchasers and mortgagees in good faith and for a valuable consideration.

The trustee is within neither of these classes. He is neither a subsequent purchaser nor a mortgagee. He calls the court's attention to an excerpt from Section 799, Lord's Oregon Laws. He fails to consider that the presumption of fraud raised by that section is a disputable one and that it is removed by evidence that the agreement is entered into in good faith and for a valuable consideration and without intent to defraud creditors. He fails also to consider that this presumption continues no longer than the property remains in the possession of the assignor or mortgagor and that as soon as the possession of the assignor or mortgagor ceases, the presumption ceases. The trustee stands in the shoes of the creditors. They fastened no lien upon this property. They were not in a position to question this agreement. They could not set it aside. The trustee cannot do what they could not do.

### III.

*The trustee is without authority to maintain this proceeding.*

Appellee's argument under this point is very interesting. He contends that under the laws of the State of Oregon a general creditor could attack the transaction between Sondheim and the bank, and cites in support of this contention *Jacobs vs. Ervin*, 9th Ore. 52. The de-

cision in that case is not applicable to the facts of the instant case for two important reasons. First, the property covered by the assignment in that case at all times remained in the possession of the assignor and he voluntarily executed an assignment to the assignee, and second, the actual possession of the property passed directly from the assignor to the assignee. Appellee is clearly mistaken when he claims that the case is authority for the proposition that a general creditor, or his assignee who stands in the shoes of the general creditor could, in the absence of any lien, proceed against a third party to recover property in that party's possession.

Discussing the case upon which appellee relies as supporting his contention, Mr. Justice Deady in *Hahn vs. Salmon*, 20 Fed. 807, says:

"In *Jacobs vs. Ervin*, 9 Ore. 57, the Supreme Court of the State held that 'when a mere lien or incumbrance, fraudulent and void as to creditors, but valid as between the parties, has been created by the assignor upon property remaining in his possession, and the title to which passes to and vests in the assignee for the benefit of creditors,' the assignee, as the representative of such creditors, may resist the assertion or enforcement of such fraudulent lien or incumbrance. But neither the opinion nor the case goes further than this, and in the former it is plainly implied that this power of the assignee only extends to the defense or protection of property of which he has both the possession and title, from the effect of a fraudulent lien or incumbrance."

He says further:

“An insolvent debtor, who has made a fraudulent transfer of his property for the purpose of defrauding his creditors, cannot reclaim it; nor can he confer a right in this respect upon another which he does not himself possess.”

It seems that this would sufficiently answer appellee's claim that a general creditor could impeach the transaction between Sondheim and the bank. That Mr. Justice Deady is correct in his interpretation of this decision rather than appellee is apparent from subsequent decisions of the Supreme Court of Oregon.

In *Gammons, assignee, vs. Holman et al.*, 11 Ore. 284, 3 Pac. 676, the rights of an assignee were before the court. One Klingel was indebted to the defendants. He entered into a parol agreement with them by which they were to make certain advances to enable him to secure certain goods which were consigned to him, and which they were to hold until he repaid all the indebtedness owing them. The defendants received possession of the goods but in the meantime Klingel had made an assignment for the benefit of all his creditors covering the goods in question. The court held that the assignee had no greater right to the goods than Klingel, and since he could not claim the goods, the assignee could not, and this in spite of the fact that the assignment was made before the defendants secured possession of the goods.

Justice Bean in *Helms vs. Gilroy*, 20 Ore. 517, 26

Pac. 851, speaking of the rights of an assignee under the general assignment law, says:

“The defendant Rogers, who alone is contesting plaintiffs’ claim, is the assignee of the defendant Gilroy, plaintiffs’ mortgagor, under the general assignment law of this state. As such assignee, he succeeds only to the rights of his assignor, and is affected by all the equities existing as against him. He takes the property subject to all existing valid liens and charges. He acquires no better title than his assignor, and, in this suit, can make no defense to the mortgage that his assignor could not make.”

Justice Moore in *Fisher vs. Kelly*, 30 Oregon 1, 46 Pac. 148, discussing a chattel mortgage which was held void because it was for the mortgagor’s own use and benefit, says:

“The general creditor is in no position to raise the question that the mortgage is void as to him until he has seized the property covered by the chattel mortgage, or secured some lien thereon.”

The case last mentioned, *Fisher vs. Kelly*, 30 Ore. 1, is cited by appellee in his brief and is a case which involved the validity of a mortgage with a so-called power of sale. Its language is clear and plain. The general creditor is in no position to raise the question that the mortgage is void as to him until he has seized



the property covered by the chattel mortgage or secured some lien thereon, and this the creditors of the bankrupt failed to do. The trustee stands in the shoes of these creditors. He can assert no rights they did not assert. They secured no lien upon this property and they are, therefore, not in a position to raise the question that the agreement is void, and he cannot raise a question they did not raise.

Mr. Justice Ross in the Flatland case passed squarely upon this point. In that case, counsel for the petitioner contended that while the mortgage was good between the parties, it was not good against the trustee, and that under the amendment of 1910, the trustee did not stand in the shoes of the bankrupt but had all the rights of a creditor possessing a levy upon the property in controversy, and that if the lien of the mortgage would not, for any reason, be valid against a levying creditor, it would not be valid against the trustee. Answering this contention, Mr. Justice Ross, speaking for the court, said:

“A conclusive answer to the suggestion here made is that there is nothing in the record showing that any of the creditors of the bankrupt other than the respondent held a lien of any character.”

Precisely the same situation exists in this case. None of the creditors other than this appellant held a lien of any character. The appellee is clearly without authority to maintain this proceeding.

Notwithstanding the decision of this court in the

Flatland case, appellee asserts that he has authority to maintain this proceeding under section 70a5. This contention proceeds upon the assumption that a general creditor could impeach the transaction between Sondheim and the bank. We have shown that under the direct and positive language of the Supreme Court of Oregon, this assumption of appellee's is unwarranted.

“A general creditor is in no position to raise the question that the mortgage is void as to him until he has seized the property covered by the chattel mortgage or secured some lien thereon.” *Fisher vs. Kelly*, 30 Ore. 1.

Discussing Section 70a5, Mr. Collier in his very valuable work on bankruptcy, pp. 996-997, says:

“That it is well settled that the trustee in bankruptcy takes not as an innocent purchaser, but subject to all valid claims, liens and equities, and that he has no better title than the bankrupt had, and is affected with every equity which would affect the bankrupt himself if he were asserting the same rights or interest.”

The decree of the District Court should be reversed.

Respectfully submitted,

SIDNEY J. GRAHAM,

Attorney for Petitioner  
and Appellant.



IN THE  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

SCANDINAVIAN-AMERICAN BANK,  
 a Corporation,

Petitioner and Appellant,

v.

R. L. SABIN, Trustee of the Estate of  
 D. Sondheim, Bankrupt,

Trustee and Respondent.

**ADDITIONAL BRIEF FOR APPELLEE.**

Petition for Revision of and Appeal From a Certain  
 Order and Judgment of the United States  
 Circuit Court for the District of Oregon.

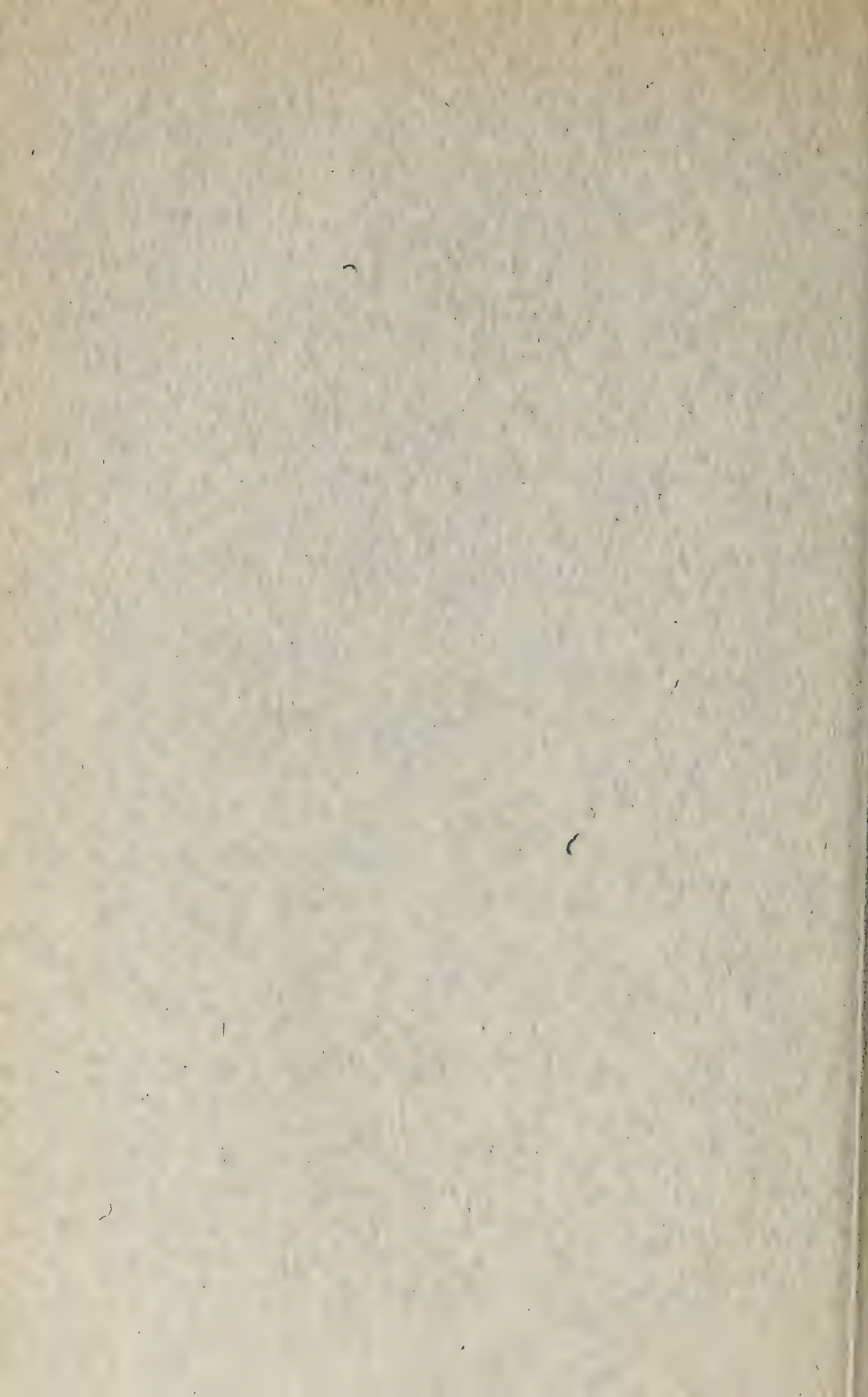
SIDNEY J. GRAHAM,

Attorney for Petitioner and Appellant.

SIDNEY TEISER,

ROSCOE C. NELSON,

Attorneys for Trustee and Respondent.





IN THE  
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SCANDINAVIAN-AMERICAN BANK,  
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v.

R. L. SABIN, Trustee of the Estate of  
D. Sondheim, Bankrupt,

Appellee.

In the Matter of D. Sondheim, Bankrupt.

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ADDITIONAL BRIEF FOR APPELLEE.

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FOREWORD.

At the oral argument of this case, counsel for appellant tendered a five-page typewritten document embodying after-thoughts, which the Court, upon request, authorized him to print, but inasmuch as it had not theretofore been exhibited to Appellee, and for the further reason that Appellee from previous experience

with Counsel for Appellant knew the range which would be taken, and that the inch would develop into the ell, the Appellee respectfully requested the Court to extend him the right to file an Answering Brief, if he so desired, which request was granted. The five pages, as anticipated, accordingly blossomed into a 39-page *post bellum* "Reply Brief" (the original Brief being 26 pages) in which will be found a *melange* of warmed-up excerpts from the original Brief with here and there new contentions and new cases not originally urged or cited so that the Appellee would have been afforded an opportunity to answer, though the scope of the controversy was thoroughly familiar to Appellant when the original Brief was filed. If the Appellant fails after this Brief is filed to forward to San Francisco in the form of letters, memoranda, or what-not, another set of disputations and heterodox authorities supposed to sustain them, he will break a precedent with which those in touch with the history of this case, before the Special Master and before the District Court, are despairingly familiar.

There are only two phases of the Appellant's most recent discussion which are worthy of extended rejoinder. As to the others we shall be extremely brief, preserving, however, for clarity the Appellant's divisions and subdivisions.

## DID THE TITLE "REMAIN" IN THE BANK?

## CONDITIONAL SALE OR TRUST?

In our answering Brief we demonstrated the fact that the settled law of this jurisdiction condemns the transaction in the instant case. Appellant replies by citing a decision in another circuit (*Dunlop v. Mercer*, 156 Fed. 549) expressly recognizing the truth of our observation as to the law governing this case, but containing the further statement which is, *quoad* this discussion, interesting, rather than important, that the law is different in some other jurisdictions.

The distinction asserted by Appellant to exist with regard to "possession" is fully discussed hereinafter under a more appropriate heading.

The Appellant avers that the appellee is "mistaken" in saying that Sondheim had unlimited power to dispose of the merchandise, and was not restricted in his utilization of the proceeds of the sale thereof. Our statement is based upon the Findings of Fact of the Special Master from which no appeal was taken and upon the view of the facts expressed by the District Court, and it will serve no useful purpose to point out again that it was a conceded fact that Sondheim was left in possession of his stock, conducted his business as before, deposited the proceeds of sales to his own credit, commingled the funds received from other sources and that

the account was at all times subject to his check, etc. We assume therefore that the *ipse dixit* of the Appellant to the effect that we are "mistaken" will not weigh heavily with the Court.

Throughout Appellant's Reply Brief, and his original Brief for that matter, he proceeds upon the unwarranted assumption that the claim of invalidity of the chattel mortgage in this case is based solely on the conduct of the parties, and that there is no question, eliminating this important feature, as to the validity of the instrument.

The conduct of the parties as shown by the Findings of Fact and the decision of the lower Court, are so flagrantly objectionable that we considered it unnecessary to devote much attention to the language of the instrument, which is after all of secondary importance, but if this case had to be determined wholly upon the question of the language of the instrument we would assert, with confidence, that it is void on its face, in Oregon, in that by the express terms thereof it attempts to assert a lien upon a store full of assets and yet gives to the mortgagor the right to remain in possession of them, sell them *ad libitum* and retain one-half of the proceeds for his own use. It is believed to be unnecessary to cite authority for a proposition which seems so axiomatic.

Leaving, however, the question of the language of the chattel mortgage, the Appellant at pages 5 and 6 of its Reply Brief makes a labored attempt to answer our point that the court is more interested in the manner in which the transaction is carried out than in the lan-

guage of the agreement. We are assured by Appellant that nothing prevented a levy of attachment by the creditors of Sondheim. One risks an attack of vertigo in attempting to follow the mazes of this particular argument, but reduced to its lowest terms it seems to amount to a reproach to the creditors for negligence in failing to suspect the sedulously guarded secret arrangement between Sondheim and Appellant, and in trusting to appearances and particularly in permitting themselves to be lulled into security by parties who now complain of this child-like faith.

As soon as Sondheim skipped and conditions became suspicious, the creditors acted at once, but the Bank having quicker and better means of information got its man to the premises an hour ahead of the sheriff, and for the first time the creditors were confronted with the information that all of the stock was claimed by the Bank because of a secret lien given it some weeks before, in consideration of its advancing less than one-half of the purchase price. If the creditors under these circumstances have been negligent or have omitted anything which vigilance would have demanded, Appellant has failed to point out the respects in which the laches inhere.

But, naively claims the Counsel for the Bank, Sondheim's possessions were "increased," not diminished by it, and therefore this secret and fraudulent preference should be sustained. We ask the Court to examine the validity of this argument in the light of the following considerations overlooked by Appellant:



1. Sondheim's possessions were also "increased" to the extent of thousands of dollars' worth of goods entrusted to him by those whom Appellee represents, upon the faith of Sondheim's apparent ownership of the business conducted by him.

2. The Bank in actual practise permitted Sondheim to check upon the funds arising from the sale of the secretly mortgaged goods at his pleasure, thus enabling him in the three weeks' time to dispose of thousands of dollars' worth of assets and skip with the proceeds several days before it took possession. Just how beneficial this "increase" was, is not apparent.

3. The Bank is not claiming the return of the \$2600 advanced by it, but of \$5200, representing also the old indebtedness of \$2600. The Pally stock to aid in the purchase of which the \$2600 is claimed to have been advanced cost Sondheim \$5800. Sondheim, therefore, used \$3200 additional money, assets for the general creditors, which the Bank now wishes to grab under the plea that it "increased" the assets.

4. The Special Master and the District Court denying the validity of Appellant's lien, found it unnecessary to pass upon the question of payment; but as a matter of fact, of the \$2600 advanced \$2,000 was recovered by the Bank before the institution of this suit (Transcript of Record, pages 54 and 58). It is true that after the adjudication in bankruptcy Appellant attempted to jockey the credits but the illegality of this ex post facto juggling is palpable.

And then Appellant, lest the Court forget the quotation from Black on page 14 of its original Brief, sets it out *in extenso* again at page 7 of the Reply Brief, oblivious of the fact that the quotation repudiates Appellant's contention in that the text-writer is careful to qualify his approval of the trust certificate doctrine by the condition "*binding him to pay over the proceeds of such sales as fast as received until the advances are repaid,*" which condition is the vital and all-important consideration omitted in the instant case.

### III

IS THE CONTRACT VALID CONSIDERED AS A CHATTEL MORTGAGE?

The assertion was made in Appellant's original Brief that under the laws of the State of Oregon a chattel mortgage in which in terms or in operation, the mortgagor is permitted to remain in possession of a shifting stock of goods and use the proceeds, or part of them, is not void. This matter was thoroughly briefed by us before and we shall not weary the Court with a repetition of the citations showing the invalidity of such a transaction to be clearly established in Oregon.

This Court has already indicated in *Peterson v. Sabin*, 214 Fed. 234, that its understanding of the Oregon decisions is that such a transaction is void, independently of the question of fraudulent intent of the parties. But the Appellant has found two more cases which he cites at page 12 of the Reply Brief.

Appellant neglects, however, to state that neither of these cases deals with a shifting stock of goods. Both of them as a matter of fact were decided before the enactment of Section 7407, L. O. L., which came into being for the first time in the Oregon General Laws of 1893, page 30. In Appellant's quotation from the first of these cases, *Marks v. Miller*, 21 Ore. 317, he garbled the language of the court in such a way as to make it appear that in referring to the "earlier decisions" the Oregon Court is speaking of its own decisions construing its own statute, whereas a reference to the case will show that it is speaking of decisions generally, in other jurisdictions.

In the *Marks* case there was a delay of three days in recording the mortgage. The Court, discussing the presumption of fraud which arose therefrom, points out that it may be rebutted (page 323) "by showing that it was made on a good and valuable consideration and was bona fide; *that such possession was fair and consistent with the terms of the mortgage, and the nature of the transaction.*"

In the instant case the possession was found to be utterly *inconsistent* with the nature of the transaction and with the terms of the mortgage in that neither the instrument itself nor the parties in carrying it out applied the proceeds in liquidation of the mortgage debt.

The other case cited by Appellant—*Davis v. Bowman*, 25 Ore. 189, deals merely with the question of priorities between mortgagees and arose at a time when a mortgage was not declared to be invalid because of failure to record. The Court points out that by record-

ing the mortgage, the mortgagor could be enabled to pledge his chattels as securities and "retain the possession and use of them in a *reasonable* way," and the mortgagee be relieved from the burden of proving the bonafides of the transaction. It is manifest from this language that the presumption of fraud cannot be rebutted by the use of them in an "*unreasonable*" way, such as, for instance, the absolute disposition of them by the mortgagor and appropriation of the proceeds with the consent of the mortgagee.

Again and again, as in the original Brief, the Appellant talks about its "good faith." This Court pointed out in *Peterson v. Sabin*, *supra*, that good faith was not the controlling consideration, and the U. S. Supreme Court expressly so held in *Knapp v. Trust Company*, 216 U. S. 545. The finding by the Special Master as to the absence on the part of the Bank of an express intent to defraud the creditors was qualified, as we pointed out in our Brief, at pages 19 and 20 (Transcript of Record, p. 41). An additional fault which inheres in Appellant's argument in this regard is its attempt to test the question of good faith by examining the motives of the Bank. The creditors are also interested in Sondheim and what Sondheim was enabled to do by virtue of his arrangement with the Bank.

As Judge Deady pointed out in *Catlin v. Currier*, Fed. Cas. No. 2518:

"Such use of the mortgaged property by the mortgagor is utterly inconsistent with the idea of giving a pledge of security to



the mortgagee. In legal effect it is a sham, a nullity—a mere shadow of a mortgage, only calculated to ward off other creditors—a conveyance in trust for the benefit of the person making it, and therefore void as against creditors. \* \* \*

But it is said by the counsel for defendant, that the question of “fraudulent intent,” under the statute is a question of fact (Code, Ore. 657), and that, as the court has found as a matter of fact, the defendant acted in the premises without any intent to defraud anyone, the only conclusion of law proper to be drawn from the facts is in favor of the validity of the mortgage.

This argument, it seems to me, is based upon two erroneous assumptions.

1st. That the fraudulent intent of which the statute speaks as sufficient to void a mortgage, is in any case, the intent of the mortgagee; and 2nd, that the question of “fraudulent intent” is not involved in this case at all. \* \* \*

As to the second error of the argument under consideration, it is sufficient to say, that such a mortgage or conveyance as this—a conveyance in trust for the party making it—is declared void as to creditors, as a matter of public policy, without reference to the intent of the parties thereto. The law assumes absolutely, and beyond doubt correctly, that in no circumstance can such a transaction be upheld in justice to creditors. In this case, whatever may have been the intention of the parties, the law for the protection of the general cred-



itors of the debtor, declares the so-called mortgage void, because made in trust for Daly."

\* \* \* \* \*

Appellant discussing the nature of the change of possession required by the Oregon statute calls attention to the case of *Rule v. Bolles*, 27 Ore. 368, which he claims as authority for the statement that the presumption of fraud from failure to record or to deliver immediate possession ceases as soon as possession is transferred.

The mental astigmatism of Appellant in this regard is curious. He apparently loses sight entirely of the fact that possession of the assets covered by the chattel mortgage was never transferred. The Bank got hold of *what was left* after Sondheim had sold, with the Bank's consent, as much as he pleased and pocketed the money. Taking possession of what little is thus left is a very different proposition from the one before the Oregon Court in the case of *Rule v. Bolles* on which appellant relies. That case did not involve any question of a shifting stock of goods which is unique and distinct. All of the property covered by the conveyance in the *Bolles* case was transferred to the possession of the vendee, and thus, if the transaction was a fair one, the equities of the creditors were preserved. The vice of the instant case which Appellant cannot or will not see, is that had the Bank procured a valid chattel mortgage from Sondheim to the extent of the \$2600 advanced by it, and proceeded to sell the stock in such a way as

to apply all of the proceeds in liquidation of its lien the creditors would have procured the equity over and above the amount of its advance, whereas it chose instead to take what it calls a mortgage, let Sondheim use the mortgaged goods as he saw fit, and when the house collapsed, grabbed what little was left and attempted to hold it for nearly the entire amount of its original claim.

In the Bolles case none of the property had been dissipated. Possession had passed, the jury found, several months before the attack, and Judge Bean expressly pointed out that the statute referred to by Appellant was not involved because the change of possession was found to have been an immediate one.

\* \* \* \* \*

At page 21, et seq. of its Reply Brief, Appellant, with renewed energy, comes back to *Orton v. Orton*, and *Bremer v. Fleckenstein* and endeavors again to distinguish the facts in the instant case. We shall not weary the Court with another summary of the flagrant manner in which the transaction was carried out. In this connection, however, Appellant makes the gratuitous statement that the evidence shows that Sondheim "deposited *all* the proceeds realized from the daily sales in the Bank." This statement is utterly without foundation, though it would make little difference if Sondheim did make such deposits inasmuch as the Appellant admits he was permitted to *check on the account as he saw fit*. *In what way would the creditors be benefited by Sondheim depositing the proceeds and the next day drawing it out in cash and skipping?* Does the fact

that Sondheim made three payments to the Bank on account, *not* under the terms of the chattel mortgage, but under a subsequent and different verbal arrangement, alter the situation? Appellant, however, thinks that in a case of this character if the mortgagee pays the mortgagor a few dollars the doctrine of *Orton v. Orton* and *Bremer v. Fleckenstein* is avoided.

We are somewhat surprised that Appellant even admits (Reply Brief, page 23) :

“Without this requirement of weekly payments, the agreement considered as a chattel mortgage, clearly would be one for the benefit of the mortgagor and the reason for holding it void against attaching creditors would be apparent.”

That admission renders it unnecessary to argue the matter further, inasmuch as all the Appellant can claim after making it, is the fact that its conduct varied in *degree* of vice as to the creditors from the conduct in *Orton v. Orton* and *Bremer v. Fleckenstein*, and not that it varied in *kind*.

Appellant continues on the same page, arguing that if the mortgagor is left in possession with the right to sell the goods, but providing for weekly payments which will extinguish the indebtedness within a reasonable time, the mortgage is clearly valid. Appellant neglects to give us the benefit of his views as to just what sized weekly payments should be demanded and as to just what is a reasonable time. The mortgagor might do as Sondheim did, conduct sales, and

get rid of large quantities of goods in bulk within three or four weeks. Or in the case of a store in a remote section, sales in three or four weeks might amount to very little. We do not therefore blame Appellant for quailing before the task of a definite statement as to how much the mortgagor should be allowed to retain for his own use, and how long a time he should be permitted within which to pay his indebtedness before the transaction comes within the inhibition of the doctrine of *Orton v. Orton*.

In law, equity and good conscience there is but one condition under which a mortgagor can be left in custody and control of property covered by mortgage, even though *recorded*, and that is that every sale shall be accounted for and, less the reasonable expense necessarily incident thereto, applied in reduction of the mortgage debt so that the equity of general or subsequent creditors in the surplus will not be impaired. To permit the debtor to retain  $\frac{1}{2}$  or  $\frac{1}{3}$  or  $\frac{1}{4}$  of the proceeds free from the mortgage claim and yet immune from attacks of general creditors who are warded off by the lien, may be only 50 per cent, or  $33 \frac{1}{3}$  per cent or 25 per cent as fraudulent or damaging but we are cited to no authority justifying Appellant's dogmatic assertion as to the magic of such percentages.

To clinch his argument in this particular Appellant drags in an Alabama case discovered in the archives—*Adkins v. Bynum*, 109 Ala. 281, which held that a distinction exists in Alabama with regard to transactions of this character, in a case in which the *entire* stock and purchase price was advanced by the mortgagee, on the



ground that no creditor is injured. We are not particularly concerned with the soundness of this doctrine, inasmuch as it is conceded in the instant case that the bank advanced only \$2600 out of a total purchase price of \$5800. The Alabama Court said in addition to the sentence quoted by the Appellant: "It (the mortgage) is not a conveyance of property out of which the creditor could have realized his claim, or some portion thereof."

Surely Appellant will not contend that the creditors could not have realized their claims or some portion thereof out of the \$3200 of his own money advanced by Sondheim in purchasing the Pallay stock.

\* \* \* \* \*

One of the two points made by Appellant calling for serious consideration is that set out under heading "C" on page 27 of the Reply Brief, as follows:

"Possession of mortgaged property by a mortgagor under an unrecorded chattel mortgage before the lien of any creditor attaches, makes such a mortgage good against every one."

We cited in our Brief (page 29) the case of *Schaupp v. Miller*, 206 Fed. 575, decided by District Judge Bean which distinctly and unequivocally holds that the taking of possession under a mortgage like the instant one before the intervention of bankruptcy, but after its execution and delivery and after the mortgagor has been allowed to remain in possession and dispose of part of



the stock, will not avail the mortgagee when the instrument is attacked.

No valid difference between that case and the instant case exists and none is pointed out by Appellant. Judge Bean recognized that the question is not free from difficulty and that there are other jurisdictions in which a different doctrine is announced.

We shall proceed to an examination and discussion of the cases cited at page 28 and at other points in Appellant's Brief, under the claim that they establish the fact that the better rule, both upon reason and authority, is that such taking of possession cures invalidity. Appellant takes comfort in the fact that the decision of Judge Bean in *Schaup v. Miller* is after all only the decision of a district court. We believe that this court will not consider as of merely passing moment the fact that Judge Bean, weighing and determining the question in the light of the law of the State of Oregon, brought to the consideration of the case in addition to the ability which commands such universal respect, a long experience upon the Supreme Court of the State of Oregon and an active participation in the decisions upon questions kindred to that at issue.

The first case cited by Appellant, that of *Etheridge v. Sperry*, 139 U. S. 277, has not so far as we can find the slightest reference to validation by *possession*. The Court dealing with the *recorded* chattel mortgage simply announced the well-known principle that it would follow as to its status, the ruling of the Courts of Iowa where the case arose.

The next citation—*Johansen Bros. Shoe Co. v.*

Alles, et al., 197 Fed. 278, is claimed by Appellant to be "squarely in point." A pertinent paragraph from the court's opinion explaining the basis of the decision will disclose just how "squarely in point" it is: (It being remembered that in the instant case the mortgage was *never recorded* and no creditor had any intimation of it.)

"The mortgage in this case *being of record*, imparted, according to the laws of the State of Missouri, *notice* to the public, and, of course, to the *creditors* of the mortgagor, of all of its provisions. They at any rate had constructive knowledge of the mortgage and of its provisions, equally as certain of being real as the mortgagee's constructive fraud was certain of being actual. They therefore knew that the mortgage was good as between the parties, and knew that they might proceed against it and fix a lien upon it for their claims superior to the right of the mortgagee if they desired to exercise the requisite diligence to do so. They knew that they must act if at all before the mortgagee should exercise his right to take possession of the property. Their failure to do so indicates their confidence in the honor and integrity of their debtor, and emphasizes what is apparent in this case, the solvency of their debtor and the actual good faith of his transaction with the mortgagee. There are, therefore, no equitable considerations which in any manner incline us to ignore the doctrine of the state of Missouri which makes for the benefit of the mortgagor in this case."

In *re Marengo, etc.*, 199 Fed. 480, next cited, is not in point so far as we can ascertain, but to the extent that it is at all instructive, it is apparently adverse to Appellant's contention.

In *re Harnden*, 200 Fed. 177, the mortgage was as in the *Johansen* case, *recorded*, and the Court expressly bases its decision on the ground that in New Mexico such a mortgage is not void as a matter of law.

In *Garner v Wright* (Ark.), 6 L. R. A. 715, a shifting stock of goods was not involved. The property was intact and the procedure was countenanced by the Arkansas law.

In *Noyes v. Ross* (Mont.), 47 L. R. A. 400, no question of taking possession was involved. The Court simply announced a rule differing from that of Oregon as to the validity of instruments preserving the rights to mortgagors, and argues that *recordation* lessens the opportunity for fraud.

In *Read v. Wilson*, 22 Ill. 380, the mortgage was *recorded* and possession taken within a few days, the attack following six weeks later.

In *Thompson v. Fairbanks*, 196 U. S. 516, the mortgage was *recorded at once*, and the Supreme Court pointed out that:

“Instead of taking possession of the time of the execution of the mortgage, the defendant had it *recorded* in the proper Clerk's office, and the record stood as notice to all the world of the existence of the lien as it stood when the mortgage was executed, and that the defendant would

have the right to take possession of property subsequently acquired, as provided for in the mortgage. The bankrupt was, therefore, not holding himself out as unconditional owner of the property, *and there was no securing of credit by reason of his apparent unconditional ownership. The record gave notice that he was not such unconditional owner. There was no secret lien.* \* \* \* \*

Appellant, however, expresses its greatest faith in *Hauselt v. Harrison*, 105 U. S. 405, which it claims to be "decisive" on this phase. In thus viewing the decision the Appellant overlooks the fact that *no element of fraud was present to vitiate the transaction*. The lien was an *equitable* one arising from the fact that the lienor was placed in possession of the goods by the lienee, and the only basis for the claim of invalidity was as in the *Flatland* case, the failure to record. Where, however (at least in Oregon), the mortgagee by the instrument or by the conduct under it enables the mortgagor to retain the power of disposition and to appropriate the proceeds, the transaction is *fraudulent* and void, and not merely defective in some formality like recordation. This is pointed out in many cases, some of which will be hereinafter referred to, but it is unnecessary to go beyond the particular opinion to illustrate this fact, because the Supreme Court evidently had the distinction in mind from its reference in the *Hauselt* decision to the case of *Yeatman v. Savings Institution*, 95 U. S. 764, the opinion in which case is quoted to the following effect:



*“Except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens or encumbrances, whether created by operation of law, or by act of the bankrupt, which existed against the property in the hands of the bankrupt.”*

The remaining cases cited by Appellant on this phase are typified by the strongest of them—Cameron v. Marvin, 26 Kansas, 612, from the decision in which by Mr. Justice Valentine, the Appellant quotes at length.

In the Cameron case the mortgagor before the filing of any lien voluntarily delivered possession to the mortgagee and this was held by the Kansas Court to suffice. The Court expressly declined to pass upon a question like that in the case at bar where possession was *not* voluntarily turned over by the mortgagor but was taken by the mortgagee after the mortgagor had become a fugitive, and taken expressly under the powers claimed to be conferred by what we contend to be a void instrument.

(The Bank's cashier testified that becoming alarmed he sent a representative to the Sondheim store to take possession under the authority of the mortgage, and that Sondheim's employees did not resist but recognized the right of the Bank. Manifestly this is not equivalent



to a voluntary delivery or pledge by Sondheim. No testimony was introduced to show that Sondheim's agents at the store had any such extraordinary authority as to dispose of all of the assets of their principal.)

However, instead of indulging in our own comments on the Cameron case, we will set out an explanation of its rationale by Judge Valentine himself in a later case, that of *Rathbun v. Berry*, 49 Kan. 375; 33 A. S. R. 389, in which case possession was obtained as in the case at bar by the mortgagee in the absence of the mortgagor, and from the mortgagor's wife. Judge Valentine after pointing out that the mortgage was invalid, continues:

“But it is claimed that the plaintiff as mortgagee obtained the possession of the goods before any of the same were sold, and that such possession cured all irregularities and rendered the mortgage valid. The possession, however, was not procured by any delivery of the goods by the mortgagor or with his consent. The plaintiff took the possession of the property without the mortgagor's consent and only by virtue of the authority given by this void mortgage—not void because it had not been deposited with the register of deeds; not void because of a want of notice to the mortgagor's creditors or subsequent purchasers or encumbrancers; not void because of an insufficient description of the mortgaged property; not void because of a want of a renewal affidavit, and not for any other irregularity which was not in contravention of good morals or public policy, *but void because of a stipulation*

*contained in the mortgage which must be considered as against public policy, if not in contravention of good morals, and as tending to hinder and delay creditors in the collection of their just claims, and thus hindering and delaying of creditors without any good reason therefor, and providing for such a disposal of the property as must necessarily render the mortgage itself substantially nugatory.* What the effect of the delivery of the possession of the mortgaged property by the mortgagor to the mortgagee, or a taking of the possession of the property by the mortgagee with the consent of the mortgagor would be, it is wholly unnecessary in this case to decide for nothing of that kind took place in this case. It was not shown that the mortgagor ever gave his consent otherwise than by the mortgage. There is no evidence tending to show that the mortgagor's wife had any authority from the mortgagor to deliver the property to the mortgagee, and it cannot be supposed that she had any such authority merely because she was his wife. A taking of the possession of mortgaged property by the mortgagee, to be sufficient to cure all irregularities and to make the mortgage void, must be either under the authority of a written instrument valid and sufficient for that purpose or under some valid parol consent of the mortgagor. Such was not this case."

\* \* \* \* \*

While this Brief is attaining proportions which we deprecate, we believe it may lessen the labors of the Court if we here set out a few cases selected from a plethora on the subject of the effect of such a taking

possession where the mortgage, as here, is fraudulent as a matter of law.

The leading case on the subject and the one cited wherever the subject is carefully considered is that of *Blakeslee v. Rossman*, 43 Wis. 116. The opinion is so instructive and convincing that we find it difficult to content ourselves with such excerpts as:

“Apparently apprehensive of its validity, the respondent tried to purge his title of the fraudulent mortgage. He undertook to show that the mortgagor voluntarily surrendered possession to the mortgagees, his creditors, without respect to the mortgage. Whether he claimed such surrender as a payment or as a pledge, is left uncertain. And the very uncertainty goes to disprove either. \* \* \* \* We do not hold that the holder of a chattel mortgage may not relinquish his right under it, and accept the mortgaged goods from the mortgagor, in payment of his debt or as a pledge. Such a transaction might be upheld in a proper case. But we do hold that such a shifting of title must be open, express and explicit; as open, express and explicit as the mortgage itself; and that one who takes possession of chattels, apparently under a mortgage, cannot, when the mortgage fails him, shift his right of possession, by vague evidence of implied understanding, to payment of his debt or to a pledge for it. Both debtor and creditor must expressly be parties to either payment or pledge. And either must be established by the acts of the parties at the time, as expressly and satisfactorily as payment or pledge in any other case. \* \* \* \*

“Without expressly saying it, the charge seems to imply, as was argued here, that possession of the mortgagees, under the mortgage, would operate to cure the fraud imputed to it by law. *It is a novel and startling proposition that possession under an instrument of title can be better than the instrument of title itself.* \* \* \* As against creditors, the paper is void from the beginning, and remains void always. No change of possession can purge it of the fraudulent provision, or operate to make that valid which was void before. Before and after possession taken, the title of the mortgagee rests equally on his mortgage, and the question between him and creditors of his mortgagor is equally upon the validity of his paper title. The title accompanies the possession and enters into it, and the possession rests on the title. The mortgagee’s possession, under the mortgage, is just as good or as bad as the mortgage itself. And no court possesses power to transmute a void mortgage into a valid pledge.”

And said Sargent, J., in the case of *Janvrin v. Fogg*, 49 N. H. 340:

“The instructions, upon this point, were erroneous; or, if it be held that this mortgage may be good and valid, as between the parties, but void as to creditors, on account of the fraudulent intentions of such parties towards such creditors, then to hold that as against such creditors, the possession of the property, taken by virtue of the mortgage, might be rightfully held as a pledge, *would be giving effect to the*



*fraud, and enabling this plaintiff to hold the property, under a contract, which he did not make, when he could not hold it under the contract which he did make. This substitution of one contract for another, would enable the plaintiff to take the full advantage of his fraudulent act."*

The difference between the instant case and one like the case of *Hauselt v. Harrison* is also well illustrated by the case of *Zartman v. First National Bank of Waterloo (N. Y.)*, 109 App. Div. 406, where it is said:

"It is urged, however, that inasmuch as the defendant acquired possession and dominion over the property before any levy was made or judgment was obtained, equity will sustain the validity of the lien. The defendant, representing the bondholders, was responsible for the agreement, which permitted the organ company to sell and dispose of the property without restriction and to use the income and profits like any owner. The defendant allowed this plenary authority to continue undiminished until the company became insolvent and until other creditors were pressing for their pay. Then it asserted its ownership to all the property to the exclusion of these unsecured creditors. There is no reason for equitable interference to aid the defendant in retaining this property when its own remissness has operated to the disadvantage of other creditors. Equity is often invoked to aid a just claim, though technically invalid, but not in a case of this kind. \* \* \* \*"



Same case on appeal 189 N. Y. 267, 82 N. E. 127.

And Mr. Justice Shiras, in Circuit, points out even more distinctly that the doctrine of *Hauselt v. Harrison* has no application to mortgages void, not for want of recordation, but because *fraudulent* in law. Said that Judge, in *Wells v. Langbein*, 20 Fed. 183, after condemning a mortgage under which the mortgagee retained possession of a shifting stock of goods:

“The fraud existing in the mortgage itself vitiates all steps taken under it. \* \* \*

Without citing further authorities upon the same proposition, it seems to me clear that the cases last named announce the true rule. If the mortgage under which possession is taken, is fraudulent and void as to creditors, then the effort to enforce it by taking possession under it cannot purge it of the existing fraud, nor render valid as against creditors that which the law, on grounds of public policy, declares to be fraudulent, and therefore void. *When a chattel mortgage, bill of sale, or other like instrument is imperfect from insufficient description, or because the property is not then in existence, or because the mortgagee did not promptly take possession, or record the mortgage, or for any reason not bottomed on fraud, then taking possession may render complete and valid that which was before incomplete, but when the validity of the conveyance is caused by the fact that it is a fraud upon the rights of third parties, upon what principle can it be held that enforcing a fraudulent mortgage, by taking possession under it, shall have the*

effect of validating it? The title and rights of the mortgagee are based upon the mortgage. He enters into possession under and by virtue of the mortgage. If the mortgage is void as to creditors by reason of fraud, the title and possession based thereon must, if attacked by creditors, fall with the foundation on which they rest. Any other rule would in most cases enable the parties to the fraud to reap the benefits of their fraudulent practice, as in that case a debtor could give a chattel mortgage upon his property to a favored creditor, or friend, remain in possession, continue to sell in the usual course of trade, use the proceeds for his own purpose, and still protect the mortgage from successful attack by being sufficiently on the alert to hand over possession to the mortgagee just before the injured creditors make a levy upon the property."

In *Stein v. Munch*, 24 Minn. 390, the chattel mortgage was invalid as here and the mortgagee subsequently, as here, took possession. Said the court:

"From this it follows that it is not in the power of the mortgagee or his assigns to remove the original taint of the mortgage and make it good by taking so much of the mortgaged property, as has not been sold by the mortgagor, into possession under and by virtue of the mortgage."

In *Mandeville v. Avery*, 124 N. Y. 276, it was urged that the objection of invalidity was not available when

possession had been obtained by the mortgagee before the validity was questioned. But the Court answered this contention as follows:

*"There is nowhere any suggestion in the evidence or findings that the mortgage was waived or abandoned or that the debtor had voluntarily delivered the property to Avery with authority to sell it.*

*"Everything that was done was pursuant to and under the mortgages. Avery could not and did not claim to have received the property or the proceeds of the sale in payment of his debt as the voluntary act of the debtor, but as mortgagee.*

*"He cannot therefore assert against the claim of other creditors the honesty of his own debt. The mortgage being void, all proceedings under it were void and although he may possess an honest claim, he cannot retain property obtained by him under a fraudulent mortgage against a pursuing creditor."*

In the case of *Madson v. Rutten*, 16 N. D. 281, 113 N. W. 872, the Court referring to the cases of *Cameron v. Martin*, *supra*, and *Francisco v. Ryan*, a case also cited by Appellant, said:

*"Most of these cases merely announce the rule that where, after the execution of a mortgage, which is void as to creditors, the parties thereto make a new agreement under which possession of the mortgaged property is turned over to the mortgagee, a valid lien is thereby created. None*

of them go to the extent of holding, aside from the cases from Illinois and Missouri, that the mere taking possession of the property by the mortgagee for the purpose of foreclosure without the express consent or agreement of the mortgagor has the effect of validating such instrument. *The great weight of authority*, and, as we think, the *better reasoned cases*, hold that the mere fact that the mortgagee in such a mortgage takes possession of the property under the terms of the instrument for the purpose of foreclosure will not operate to validate the same, and that the creditors may pursue the property in his hands."

From these selected cases it will be seen that the Appellant is somewhat rash in asserting that the weight of reason and authority endows possession with the power of sanctifying fraud in a mortgage transaction. It is evident that many respectable courts agree with Judge Bean in the conclusion reached by him in *Schaupp v. Miller*, 206 Fed. 255, that the weight of reason and authority is to the contrary.

The gist of the objection to the doctrine contended for by Appellant is well stated in the form of a rhetorical question in the case of *Harvey v. Crane* (U. S. Circuit, Ill.), Fed. Case No. 6178:

"Can the creditors keep their business and supposed securities in their pockets, and permit their debtors to go on and do business as owners of the property and as soon as trouble threatens, watch their op-

portunity and sweep away all, simply by taking possession?"

In addition to the cases which we have above quoted we call the Court's attention to the following well-considered cases all holding the law to be as contended here:

Stephens v. Perrine, N. Y. 39 N. E. 11 (decided by Mr. Justice Peckham);

In re Morrill, 2 Sawy. 356, Fed. Case No. 9821;

Crooks v. Stuart (U. S. Circ. Ct. Ia.), 7 Fed. 800;

Smith v. Ely (U. S. Cir. Court N. Y.), Fed. Case No. 13,044;

Stein v. Munch, 24 Minn. 390;

In re: Foster, Fed. Case No. 4964;

Chapman v. Sargent (Colo.), 40 Pac. 849;

Second National Bank v. Hunt, 11 Wall. 391;

Allen v. Massey, 17 Wall. 351.

In the case of Robinson v. Eliot, 22 Law. ed. 758, 22 Wall 513, the facts were similar to those under examination here in that the mortgagee took possession before bankruptcy and the mortgage was held invalid at the suit of the trustee, the court holding that the subsequent transfer of possession did not render the transaction valid.

The one polar star to be observed throughout and



which will illuminate the fallacy of Appellant's argument in this and in every other respect is the word

### "FRAUD"

and the whole principle with reference to the futility of a taking possession of what is left of a shifting stock of goods, after the mortgagor has been allowed to retain its custody and power of disposition and appropriate the proceeds of the part sold, is clearly and precisely expressed in the common law maxim:

*Ex nihilo nihil fit.*

\* \* \* \* \*

Under the subdivision

"(d) Even without a change of possession, an unrecorded mortgage given in good faith is good against every one but subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property,"

Appellant brings forward nothing which was not fully answered in our original Brief. The question of possession has been adverted to. We called attention to our original Brief to the language of Section 799 L. O. L. which renders a transaction of this character invalid not merely as to subsequent mortgagors but as to creditors generally where the possession continued in the mortgagor and in this case it continued until the eve of bankruptcy, and the inference results that the debts to the creditors represented by the trustee were not incurred subsequent to the change of possession.

Nor has this presumption of fraud been removed as Appellant assumes. Rather it has been indelibly stamped upon the transaction by the incidents already so often referred to.

\* \* \* \* \*

The only other question in this case is that discussed by Appellant under

### III.

#### THE AUTHORITY OF THE TRUSTEE TO MAINTAIN THIS SUIT.

In arguing the right of the Trustee to attack the mortgage here we referred to the somewhat analogous right asserted by the Supreme Court of Oregon in *Jacobs v. Ervin*, 9 Ore. 52, to inhere in the assignee at Common Law or under State Insolvency laws.

The Appellant quotes from the case of *Hahn v. Salmon*, 20 Fed. 807, That case did not in any wise involve the setting aside by an Assignee of a fraudulent chattel mortgage but was an attack upon the assignment itself by the attaching creditor. That opinion is also quoted by the Appellant to the effect that inasmuch as an insolvent debtor who has made a fraudulent transfer of his property cannot reclaim it, *he* cannot confer such a right on another; i. e., an assignee. Possibly not, but the *law can*, and precisely this right is conferred on the Trustee by Section 70 (a) 4 of the

Bankruptcy Act of 1898, which specifically endows the trustee with the *title to "property transferred by him (the bankrupt) in fraud of his creditors."*

Gammons v. Holman, 11 Ore. 284, next cited by Appellant was to the effect merely that an assignee could not attack the possession of one who had received personal property from the debtor in *good faith*, as security for advances. It was there said that the assignee took the legal title and no more and acquired the rights of the assignor. No question of a creditor's right was then in issue; indeed no creditor could have successfully attacked Holman & Co., *for the reason that there was no fraud*. Helms v. Gilroy, 20 Ore. 517, is to the same effect.

Appellant then cites Fisher v. Kelly, 30 Ore. 1, in which it is said that a mere general creditor cannot raise the question of the invalidity of a chattel mortgage. At page 36 of its Brief Appellant asserts that these cases sufficiently answer our "claim that a general creditor could impeach a transaction between Sondheim and the Bank." Appellant thus valiantly assails windmills. We assume that Appellant would hardly deny the right of the State or of the United States to endow the Trustee with authority which it denied to a mere general creditor. *And that authority has been specifically conferred in transactions in which a taint of fraud inheres by Section 70 (a) 4* which by conferring title on the trustee to property fraudulently aliened necessarily endows him with power to assert that title by appropriate remedies.

Again, Section 70 (e) of the Bankruptcy Act explicitly provides:

“The Trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, etc.”

Here again, it must be borne in mind that the Trustee since the 1910 Amendment of Section 47 (a) is not merely a general creditor but is a *judgment creditor*. The inquiry then is would a judgment creditor have the right to attack a mortgage declared by the state law and adjudication to be fraudulent, and void as to creditors? The question answers itself. Assuredly a judgment creditor by virtue of a creditor's bill or other appropriate remedy, has a standing in Court to attack and set aside a fraudulent conveyance.

Appellant recurs to the Flatland case, 196 Fed. 310, and has the hardihood to assert “precisely the same situation exists in this case.” We have before pointed out that no question of fraud arose in the Flatland case, the invalidity was claimed to inhere merely in a formal defect—recordation. (Even as to this *quaere*—whether or not the Flatland case has been impliedly departed from—in line with the holding in the other circuits—by the case of Pacific State Bank v. Coates (9th Circuit), 205 Fed. 618.) There is not a line in the Flatland directly or indirectly, denying or bearing on the right of the trustee to assail a *fraudulent* conveyance. Indeed the opinion quotes with implied approval the decision of the Supreme Court of the United States in the case of Yeatman v. Savings Institu, 95 U. S. 764, to the effect that while the trustee takes the title of the bankrupt subject to equities, *yet an exception exists* “in

cases where the disposition of the property of the bankrupt is declared by law to be fraudulent and void," and this is just such a case under the laws and decisions of the State of Oregon in which this transaction occurred.

The books teem with cases thus construing section 14 of the Bankruptcy Act of 1867 which like Section 70 (a) 4 of the Act of 1898 vests in the trustee title to property conveyed by the bankrupt in fraud of his creditors, and these cases apply the provision definitely and specifically to transactions identical with that at bar, i. e., mortgages which under their terms or in operation permit the mortgagor to retain and dispose of all or a part of a shifting stock of merchandise, nominally covered by the mortgage. Many of these cases have been cited hereinbefore in other connections and will not now be repeated.

We will quote from only one of these: *Edmondson v. Hyde*, Fed. Case No. 4285, decided by Circuit Judge Sawyer, in which an unusually full and clear discussion of the matter occurs. Said that Judge *inter alia*:

"What does this phrase, 'in fraud of his creditors' mean? Can it be limited to property conveyed with a specific intent to defraud creditors, or is it to be extended to conveyances in fraud of creditors in the technical and legal sense of the term? Upon what principle can the construction be limited to the former class? \* \* \*

"A party who mortgages a stock of goods for example, and yet retains possession, controls and sells them, and surrounds them with all the indicia of owner-



ship in himself, lulls existing creditors into a false security, and induces others to credit him on the supposition of his ownership, thus working actual fraud, whether so specifically intended or not. This result having been found in practice to be so common, the dictates of good policy suggested that the law should, in all cases, declare that to be fraudulent in contemplation of law, regardless of any specific intent, which was ordinarily found to be so in fact."

See also in re: Werner, Fed. case No. 17,416 (Judge Dillon).

Second National Bank v. Hunt, 11 Wall. 391, was a contest between the trustee in bankruptcy and the mortgagee under a shifting stock mortgage, who had taken possession as in the case at bar, and the trustee prevailed.

So Robinson v. Elliott, 22 Law Ed. 758, was likewise a case in which a mortgagee under a shifting stock mortgage took possession before bankruptcy, but the trustee prevailed.

See also Allen v. Massey, 17 Wall. 351.

And we again invite the Court's attention to the well reasoned case of Mitchell v. Mitchell, erroneously cited in our original Brief as 12 A. B. R. 389 (instead of 17 A. B. R. 382), 147 Fed. 208.

In view of the quotation by Appellant from Collier and from Black in other connections the Court may be interested in the views of these text writers on this particular subject:

“But more than this, the act provides \* \* \* (Sec. 70a) that the trustee shall be vested with title to property conveyed by the bankrupt *in fraud of his creditors*. As to such property therefore, the trustee is not merely a successor to the rights of defrauded creditors, but he is invested with the *title*, and may sue to vacate or avoid any fraudulent transfer of the bankrupt’s property *whether or not there is any creditor armed with a lien or otherwise in a position to attack such transfer*.” Black on Bankruptcy, Sec. 446, p. 979, 980.

“It is immaterial that the creditors of the bankrupt were not in a position to attack the transfer.”

Collier on Bankruptcy, p. 1042e.

“Such a suit may be maintained although neither the trustee nor any creditor has reduced the claim to a judgment. To hold that a trustee cannot attack a fraudulent conveyance made by a bankrupt more than four months before the filing of the petition without showing that some creditors had obtained a judgment and issued execution thereon, so that he could maintain a similar action would be simply to provide an easy and convenient method for a dishonest debtor to dispose of his property.” *Ib.* p. 1042f.

\* \* \* \* \*

Mr. Collier in this connection cites the case of *Thomas v. Roddy* (N. Y.), 19 A. B. R. 873, and *Sheldon v. Parker* (Neb.), 11 A. B. R. 152.

In the former case the Court passing upon the right of the trustee to attack a conveyance on the ground that

it was in fraud of the creditors cites as its authority for sustaining such an action, Section 70 (a) 4 of the Bankruptcy Act endowing the trustee with title to property transferred by the bankrupt in fraud of his creditors. The Court considers in this connection Section 70e, which contains the further proviso that the trustee may avoid any transfer by the bankrupt which any creditor of the bankrupt could have avoided and the Court holds that the trustee by virtue of Section 70 (a) 4 is clearly invested with the title of property transferred by the bankrupt in fraud of creditors unless that right should be held to be restricted by subdivision (e) of the same section, which restriction the Court said it did not believe existed, the opinion continuing:

“The policy of the Act is to secure an equal distribution of all property of the bankrupt among his creditors. For that purpose the trustee represents all the creditors and may maintain an action to set aside any transfer which any creditor could or which any creditor might acquire by any process taken by him. \* \* \*

“Under the Bankruptcy Act of 1867, which contained a provision to the effect that title to property fraudulently transferred vested in the assignee, now the trustee, it was held that the assignee could maintain an action to set aside such transfers whether any individual creditor could have done so or not. *Platt v. Matthews*, 10 Fed. 280; *Matter of Leland*, 10 Blatchf. 503. Judge Wallace, who delivered the opinion in the *Matthews* case, concluded by saying:

“ ‘Numerous other authorities might be cited to sustain the position that an assignee may proceed to recover property transferred in fraud of creditors whether any creditor was in a position to attack the transfer or not, and that his title accrues by force of the act, and not through the rights of the creditor to assert the fraud.’ ”

\* \* \* \* \*

In conclusion we submit that assuming the intent and spirit of the Bankruptcy law to be to preserve a parity among the creditors, to ratify and confirm so far as may be, the law and practice of the particular state, with reference to the validity of liens and bona fides of mortgage transactions, transfers and other conveyances; keeping in view the fact that the State of Oregon has more strongly perhaps than any other state, condemned as utterly and hopelessly fraudulent a transaction like the present, in which a shifting stock of goods is covered by a secret mortgage kept from the records, and by the very terms of the agreement the mortgagor is given the right inconsistent with any honest mortgage, of retaining one-half of the proceeds of the goods of which is he permitted to dispose, and when beyond that, in actual practice, the mortgagee does not even insist upon the payment to it of one-half of the proceeds, but makes a subsequent and different arrangement, not in writing, and also not recorded by which it is to receive a certain sum per week, regardless of the amount of the mortgaged property which may be sold; and where this course of conduct is continued until the eve of bank-



ruptcy when writs of attachment have been issued, and the mortgagor is a fugitive when the mortgagee quietly slips an agent into possession—to contemplate a transaction of this character and argue it immune, under any theory, from attack by the trustee appointed to protect the rights of the creditors, and assail fraudulent conveyances, and armed for that purpose by the law itself, with title to property fraudulently conveyed and given also the rights of a judgment creditor, produces necessarily a sensation of logical revulsion.

Such a result must be the product of sheer sophistry and that sophistry is apparent at every stage of Appellant's argument, and his conclusions are reached by the false assumption that the mortgage is only presumptively void and not void as a matter of law, despite decision after decision expressly declaring the reverse to be true; by the false assumption that a proceeding in the way of a subsequent taking of possession of what is left of the mortgaged property after the harm has been done, gives life and respectability to the void instrument although the decisions in this jurisdiction and the weight of reasoning and authority elsewhere, including the United States Supreme Court, pronounces the reverse to be true; by the false assumption that conceding the invalidity, yet the intervention of bankruptcy proceedings designed to put a stop to just such looting, has the effect of denying a remedy to those who have been wronged, upon which phase Appellant is equally insistent, despite the plain provisions of the Act, the decisions of the courts, and the views of text writers who have made the subject a life study.



We earnestly believe that this court will not adopt views rendering the Bankrupt Act so futile and actually harmful a species of legislation.

Respectfully submitted,

**SIDNEY TEISER,**

**ROSCOE C. NELSON,**

Attorneys for Trustee and Respondent.



No. 2616

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United States  
Circuit Court of Appeals

For the Ninth Circuit

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STIMSON MILL COMPANY, A CORPORATION, CLAIMANT OF THE  
tow boat "Tillicum," her engines, boilers, tackle, apparel  
and furniture,

Appellant,

*vs.*

THE INLAND NAVIGATION COMPANY, A CORPORATION, CLAIMANT  
of the steamer "Rosalie," her tackle, apparel and furni-  
ture,

Appellee.

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Apoptles

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Filed

JUN 23 1915

F. D. Monckton,  
Clerk.

Upon Appeal from the United States District Court for the Western  
District of Washington, Northern Division.

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No.

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In the District Court of the United States for the Western  
District of Washington, Northern Division.

No. 4730.

THE INLAND NAVIGATION COMPANY, A CORPORATION, LIBELANT,  
*vs.*  
THE TOW BOAT "TILlicum," ETC., RESPONDENT.

NAMES AND ADDRESSES OF COUNSEL

IRA BRONSON, Esq., Proctor for Libelant and Appellee,  
614 Colman Building, Seattle, Washington.

J. S. ROBINSON, Esq., Proctor for Libelant and Appellee,  
614 Colman Building, Seattle, Washington.

H. B. JONES, Esq., Proctor for Libelant and Appellee,  
614 Colman Building, Seattle, Washington.

E. C. HUGHES, Esq., Proctor for Claimant and Appellant,  
661 Colman Building, Seattle, Washington.

MAURICE McMICKEN, Esq., Proctor for Claimant and Ap-  
pellant,  
661 Colman Building, Seattle, Washington.

W. T. DOVELL, Esq., Proctor for Claimant and Appellant,  
661 Colman Building, Seattle, Washington.

H. J. RAMSEY, Esq., Proctor for Claimant and Appellant,  
661 Colman Building, Seattle, Washington.

## STATEMENT.

Time of commencement of suit: October 5, 1911.

Number of Cause in Lower Court and Names of Parties to Suit: Cause No. 4730. The Inland Navigation Company, a corporation, Libelant, vs. The Tow Boat "Tillicum," her engines, boilers, etc., Respondent, Stimson Mill Company, a corporation, Claimant and Cross Libelant.

Several dates at which the respective pleadings were filed: Libel filed October 5, 1911. Claim filed October 6, 1911. Answer and Cross Libel filed April 13, 1912. Claim on Cross Libel filed April 16, 1912. Answer to Cross Libel filed January 24, 1913.

Issuance of Process and Service thereof: Monition and attachment issued on Libel October 5, 1911; Tow Boat "Tillicum," her engines, etc., attached on said monition October 6, 1911; monition returned and filed October 6, 1911. Bond in the sum of \$10,000 for release of vessel filed October 6, 1911, and vessel released to claimant. Monition and attachment issued on Cross Libel April 13, 1912. Steamer "Rosalie," etc., attached on said monition April 16, 1912; monition returned and filed April 16, 1912. Bond in the sum of \$2,000 for release of said vessel filed April 16, 1912, and vessel released to claimant.

Reference to Commissioner: December 31, 1912, cause referred to commissioner to take testimony and return the same into Court. August 18, 1914, said testimony having been taken was duly filed in said District Court by said commissioner. September 8, 1914, cause re-referred to commissioner to take further testimony and return the same into Court. September 17, 1914, said further testimony having been taken was duly filed in said District Court by said commissioner.

Time of Trial: Thereafter said cause was duly submitted on briefs on the merits, the same being heard upon the testimony so taken before and reported by said commissioner, the same being submitted to Honorable Jeremiah Neterer, District Judge, on October 16, 1914.

Memorandum decision filed October 22, 1914.

Final decree filed October 26, 1914.

Notice of appeal filed April 22, 1915.

Citation issued and served April 22, 1915.

Assignments of error filed June 7, 1915.

Bond for costs on appeal filed April 22, 1915.

In the District Court of the United States for the Western  
District of Washington, Northern Division.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	} Libelant,	No. 4730
<i>vs.</i>		
THE TOW BOAT "TILlicum," HER ENGINES, BOILERS, tackle, apparel and furniture,	} Respondent.	

*Libel.*

The libel of the plaintiff, The Inland Navigation Company, a corporation, organized, created and existing under and by virtue of the laws of the State of Oregon, against the Tow Boat "Tillicum," her engines, tackle, boilers, apparel and furniture, and against all persons lawfully intervening for their interest in the same in a cause of collision, civil and maritime, alleges as follows:

I.

That at all times hereinafter mentioned, the above mentioned libelant was, and ever since has been, and still is, a corporation, organized, created and existing under and by virtue of the laws of the State of Oregon; that during all times hereinafter mentioned, said libelant was the owner of that certain steam vessel called the "Rosalie" with her engines, boilers, tackle, apparel and furniture, which said vessel was used and operated in transporting passengers and freight between the City of Seattle, State of Washington, and other ports and places upon the waters of Puget Sound.

II.

That said Steamship "Rosalie" was a wooden vessel of 318.51 gross and 226.63 net tonnage, and at the time of her collision hereinafter mentioned, said vessel was stout, staunch and in all respects well manned, tackled, apparelled and appointed, and had the usual and necessary complement of officers and crew.

III.

That the steam Tow Boat "Tillicum," at all times hereinafter mentioned was a wooden vessel of about 87 feet in length, and her master was, and is one.....

IV.

That on the 8th day of April, 1911, while said Steamship Rosalie was proceeding on her regular trip from the port of Bellingham in the State of Washington, on a voyage to the

port of Seattle, in the State of Washington, with a cargo of freight and passengers, and at the hour of about 5:10 A. M. the said steamship being about one mile south of the West Point Lighthouse, and while a dense fog hung over the waters of Puget Sound, and while said vessel was proceeding therein under slow bell and regularly sounding her fog signals as required by the regulations for avoiding collisions, and every precaution being taken to avoid collisions up to the time of the collision hereinafter mentioned, the fog signals of a vessel were heard some distance directly ahead; thereupon the engines of the *Rosalie* were stopped and alarm signals sounded. Soon thereafter the tug boat *Tillicum*, with an unknown scow in tow appeared through the fog at a short distance from the *Rosalie* and heading in a course across the *Rosalie*'s bow. The master of the *Rosalie* at once ordered his engines full speed astern, which checked all forward movement of the *Rosalie*, but before she could gather sternway, the scow towed by the *Tillicum* collided with the *Rosalie*, breaking the stem of said *Rosalie*.

#### V.

The libelant further alleges that the collision was in no way due to any fault on the part of the *Rosalie*, which was carefully operated, nor to her officers or crew, but was due wholly to fault on the part of the *Tillicum*, in that she was navigated at too great speed in a fog; in that she did not give proper heed to the fog signals of the *Rosalie*; in that she did not stop or reverse her engines in time as she should have done, and in that she was in other respects improperly and carelessly navigated.

#### VI.

The libelant further alleges that by reason of the breaking of the stem of said *Rosalie*, and on account of the expenses and demurrage arising out of said collision, it has been damaged in a sum of Five Thousand Three Hundred Thirty-nine and 72/100 (\$5,339.72) Dollars.

#### VII.

That said *Tillicum* is now lying in Seattle harbor, near Ballard, and within the jurisdiction of this court.

#### VIII.

That all and singular the premises are true.

Wherefore, libelant prays that process in due form of law, according to the practices of this honorable court, may issue against the steam tow boat *Tillicum*, her engines, boilers,



tackle, apparel and furniture; and that all persons having, or pretending to have any right, title or interest therein may be cited to appear and answer all and singular, the matters aforesaid; and that this honorable court would be pleased to decree to the libelant the payment of the said damages, with costs, and that the said vessel may be condemned and sold to pay the same, and that the libelant may have such other further relief as in law and justice it may be entitled to receive.

THE INLAND NAVIGATION COMPANY,  
By JOSHUA GREEN, *President.*  
IRA BRONSON, *Proctor for Libelant.*

THE UNITED STATES OF AMERICA,

*State of Washington, County of King, ss:*

On this 5th day of October, 1911, before me, at Seattle, personally appeared Joshua Green, president of the within named Inland Navigation Company, and made oath that he had read the foregoing libel, and knows the contents thereof and that the same is true as to his own knowledge, except as to those matters and things stated to be on his own information and belief, and to those matters and things, he believes them to be true.

JOSHUA GREEN.

Subscribed and sworn to on the last day above mentioned before me.

[SEAL.]

ROBERT W. REID.  
*Notary Public in and for the State of  
Washington, residing at Seattle.*

(Endorsed:) Libel. Filed in the U. S. District Court, Western Dist. of Washington, Oct. 5, 1911. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

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In the United States District Court for the Western District  
of Washington, Northern Division.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	} Libelant,	} No. 4730
vs.		
THE TOW BOAT "TILlicum," HER ENGINES, ETC.		

*In Admiralty.*

To the Honorable C. H. Hanford, Judge of said Court:

Stimson Mill Company, a corporation, owners of the said tow boat "Tillicum," her tackle, apparel and furniture, inter-



vening for its interest in the said vessel, her tackle, etc., appear before this Honorable Court and claim the said vessel, her tackle, etc., and state that it is the true and bona fide owner thereof, and that no other person is the owner thereof; wherefore it prays to be admitted to defend accordingly, and that the said Court will be pleased to decree a restitution of the same to it and otherwise right and justice to administer in the premises.

STIMSON MILL COMPANY,  
By J. F. IVES, *Its Manager*.

Sworn to October 6, 1911, before me.

[NOTARIAL SEAL]

H. J. RAMSEY,  
*Notary Public in and for the State of  
Washington, residing at Seattle.*  
HUGHES, McMICKEN, DOVELL & RAMSEY,  
*Proctors for Claimant.*

(Endorsed:) Claim of Stimson Mill Company. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 6, 1911. A. W. Engle, Clerk. By F. A. Simpkins, Dep.

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In the United States District Court for the Western District  
of Washington.

KNOW ALL MEN BY THESE PRESENTS

That we, Stimson Mill Company, a corporation, as principal, and C. D. Stimson and Thos. D. Stimson, as sureties, are held and firmly bound unto Joseph R. H. Jacoby, Esquire, *Marshal of the United States*, for the Western District of Washington, in the sum of Ten Thousand (\$10,000.00) Dollars, to be paid to the said Marshal, for the payment of which, well and truly to be made, we each bind ourselves, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 6th day of October, in the year of our Lord one thousand nine hundred and eleven,

WHEREAS, a Libel was filed in the District Court of the United States for the Western District of Washington, Northern Division, on the 5th day of October, in the year of our Lord one thousand nine hundred and eleven, by The Inland Navigation Company, a corporation, Libelant, against the Towboat "Tillicum", her engines, etc., for the sum of Five Thousand Three Hundred Thirty-nine and 72-100 Dollars, on which process of attachment has issued, and the said

Towboat "Tillicum" is in custody of the said Marshal under the said attachment, and WHEREAS, Stimson Mill Company, a corporation, has applied for a discharge of said Towboat "Tillicum" from the custody of the said Marshal, and has filed a claim claiming the said Towboat "Tillicum," her engines, etc., and has filed a stipulation for the claimant's costs, pursuant to the rules and practice of the said Court:

NOW, THEREFORE, the condition of this obligation is such, that if the above bounden Stimson Mill Company shall abide by and answer the decree of this Court, or in case of appeal, the decree of appellate court, in such cause, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

STIMSON MILL COMPANY, [SEAL]

By J. F. IVES, [SEAL]

*Its Manager.*

C. D. STIMSON. [SEAL]

THOS. D. STIMSON. [SEAL]

Signed, acknowledged and delivered before me this 6th day of October, 1911.

[NOTARIAL SEAL]

H. J. RAMSEY,

*Notary Public in and for the State of  
Washington, residing at Seattle.*

UNITED STATES OF AMERICA,

} ss.

WESTERN DISTRICT OF WASHINGTON.

C. D. Stimson and Thos. D. Stimson, being duly sworn, deposes and says each for himself, that he is worth the sum of Twenty Thousand Dollars, over and above all his just debts and liabilities, and that he is a resident of said District.

C. D. STIMSON.

THOS. D. STIMSON.

Sworn to before me this 6th day of October, 1911.

[NOTARIAL SEAL]

H. J. RAMSEY,

*Notary Public in and for the State of  
Washington, residing at Seattle.*

I approve of the sufficiency of the sureties to the within bond.

Dated at Seattle, Wash., this 6th day of October, 1911.

C. H. HANFORD, *Judge.*

Notice required by Rule 28 hereby waived.

IRA BRONSON, *Proctor for Libellant.*

(Endorsed:) Bond to U. S. Marshal under Section 941 of the Revised Statutes of the United States. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 6, 1911. A. W. Engle, Clerk. By F. A. Simpkins, Dep.

In the District Court of the United States for the Western District of Washington, Northern Division.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	} Libelant,	} No. 4730
<i>vs.</i>		
THE TOW BOAT "TILlicum", HER ENGINES, BOILERS, etc.,	} Respondent,	
STIMSON MILL COMPANY, A CORPORATION, CLAIMANT.		

*Answer and Cross-libel.*

The answer of Stimson Mill Company, a corporation, claimant of the Tug Boat "Tillicum", her engines, boilers, etc., to the libel of The Inland Navigation Company against the Tow Boat "Tillicum", alleges as follows:

I.

That it admits the allegations in Paragraph I of said libel.

II.

That it admits that said steamship "Rosalie" was a wooden vessel of 318.51 gross and 226.63 net tonnage, but as to each and every of the remaining allegations in Paragraph II of said libel it denies any knowledge or information sufficient to form a belief.

III.

That it admits the allegations in Paragraph III of said libel.

IV.

Answering Paragraph IV of said libel, it admits that on the 8th of April, 1911, while said steamship "Rosalie" was proceeding on her regular trip from the Port of Bellingham to the Port of Seattle, in the State of Washington, at about the hour of 5:15 A. M., and when between a mile and a mile and a quarter south of West Point Lighthouse, a collision occurred between the said steamship "Rosalie" and a scow towed alongside the steam tug "Tillicum", and it admits

that for some time prior thereto the officers navigating the said steamship "Rosalie" heard the fog signals of said tug "Tillicum"; but it denies each and every of the remaining allegations of said Paragraph IV, and avers that the truth in the premises is as hereinafter in claimant's affirmative answer and cross-libel set forth.

V.

That it denies each and every allegation in Paragraph V of said libel.

VI.

Answering Paragraph VI of said libel, this claimant denies that it has any knowledge or information as to the nature or extent of the injury, or damages and demurrage arising out of said collision, and it denies that said libelant has been damaged in the sum of Five Thousand Three Hundred Thirty-nine and Seventy-two hundredths (\$5,339.72) Dollars, or any other sum.

VII.

Claimant denies each and every allegation of the Eighth Paragraph of said libel.

Further answering, and by way of cross-libel herein, this claimant avers:

I.

That it is a corporation organized and existing under and by virtue of the laws of the State of Washington, and is the owner of the steam tug "Tillicum", of the length of 87 feet 6 inches, of the breadth of 19 feet 6 inches, and a draft of 10 feet 6 inches, and of 116 tons gross tonnage; and that it is also the owner of a barge known as Stimson Barge No. 8, of the length of about 100 feet and a breadth of 26 feet.

II.

That at 4:15 o'clock A. M., on the morning of April 8, 1911, the said steam tug "Tillicum", with the said Barge No. 8 made fast upon its port side, its bow extending twenty or thirty feet forward of the bow of the said "Tillicum", said barge having on board two oil tank cars, loaded with oil, left the Standard Oil Dock, in the Port of Seattle, and proceeded on its way to make and pass West Point Light; that at said time, and at all times hereinafter mentioned, a dense fog existed over that portion of Puget Sound through which said steam tug proceeded.

That said steam tug proceeded with its tow at a speed of about five knots an hour until it reached a point in the



vicinity of Four Mile Rock, when it reduced its speed to about three knots an hour, for the purpose of locating its position by the echoes of its fog whistle from Magnolia Bluff, and, obtaining such echoes, continued at said speed of about three knots an hour, in order that when the said echoes ceased it might have its proper position from which to change its course so as to pass West Point Lighthouse; and that at all times after leaving said dock and until immediately prior to the collision hereinafter mentioned, it sounded its fog whistle at intervals of a minute or less, as required by law.

### III.

That at all the times herein mentioned, the said steam tug was duly and properly equipped and manned, as required by law, and that the Master of said tug, Captain E. N. Charlesworth, and the Mate of said tug, A. W. Anderson, were both duly licensed officers, and were on lookout in the pilot house of said tug boat and engaged in the navigation of said steam tug and her tow; that when between a mile and a mile and a quarter south of West Point Light, and after having received echoes of its fog whistle from the bluff for about ten minutes, said captain and said mate heard the echo of its fog whistle from some object in the fog directly ahead; that though no fog whistle or other warning had been previously given, the said master determined that, from the location of said echo, he was approaching a vessel ahead, and thereupon immediately signaled his engineer to stop the engine; and that a few seconds later the said captain and mate saw through the fog the glimmer of lights which they afterwards determined to be the range lights of the "Rosalie", directly ahead, and immediately signaled the engineer to reverse the engines of said steam tug full speed astern and sounded the danger signal by giving four blasts of the whistle of said tug, which were at once answered by four blasts from the whistle of the steamship "Rosalie", whose lights were then distinctly appearing in the fog and bearing directly down upon said tug boat; that the captain of said tug boat thereupon gave three blasts of his whistle, to inform said steamship "Rosalie" that his engines were going full speed astern; that by reason of said tow being on its port side said tug boat, in going astern, swung its bow to starboard; that in a few seconds thereafter, and after said steam tug and her tow had begun to make sternway, the steamship "Rosalie" approaching head on, or nearly so, struck the bow of said Barge No. 8, causing damage to said barge and cargo,



and in the delay and demurrage occasioned to said tug in the sum of Six Hundred (\$600.00) Dollars

IV.

That the said collision was caused and the said damage incurred by reason of the failure and neglect of said steamship "Rosalie" to sound fog signals, as required by law, and by reason of said steamship "Rosalie" being operated in said fog at an excessive and unlawful rate of speed, and by reason of the failure and neglect of the officers in command of said steamship "Rosalie" to observe the fog signals of the steam tug "Tillicum" and to exercise proper seamanship in avoiding the collision with said tug and her tow.

V.

That the said steamship "Rosalie" is now within the jurisdiction of this court, and that all and singular the premises are true.

WHEREFORE, this cross-libelant prays that process, in due form of law and according to the practice of this court, may issue against said steamship "Rosalie", her engines, boilers, tackle, apparel and furniture, and that all persons having or claiming any right, title or interest therein may be cited to appear and answer all and singular the matters in this cross-libel set forth, and that this honorable court will be pleased to decree to cross-libelant herein the payment of said damages and costs, and that said steamship "Rosalie" may be condemned and sold to pay the same, and that this cross-libelant may have such other and further relief as in law and justice it may be entitled to receive.

STIMSON MILL COMPANY,  
By J. F. IVES, *Manager*.

UNITED STATES OF AMERICA, }  
STATE OF WASHINGTON, } ss.  
COUNTY OF KING. }

On this 9th day of April, A. D. 1912, before me, at Seattle, personally appeared J. F. Ives, Manager of the Stimson Mill Company, and made oath that he has read the foregoing answer and cross-libel, that he knows the contents thereof, and that the same are true, as he verily believes.

J. F. IVES.

Subscribed and sworn to before me, this 9th day of April, 1912.

[SEAL]

H. A. OWEN, JR.,  
*Notary Public in and for the State of  
of Washington, residing at Seattle.*

Copy of within answer and cross-libel received, and due service of same acknowledged this 9th day of April, 1912.

IRA BRONSON, *Proctor for Libelant.*

Endorsed: Answer and Cross Libel. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 13, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	}	Libelant,
		<i>vs.</i>
THE TOW BOAT "TILlicum", HER ENGINES, BOILERS,	}	No. 4730
etc.,		
		Respondent,
STIMSON MILL COMPANY, A CORPORATION,	}	Claimant and Cross-Libelant.

*Claim by President of Owner.*

To the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division:

Now comes Joshua Green, and respectfully states and represents that he is the President of The Inland Navigation Company, a corporation, duly created and existing under and by virtue of the laws of the State of Oregon, and duly authorized to do business in the State of Washington, with a principal office and place of business in the City of Seattle, King County, Washington; that said corporation is the sole owner of the Steamship "Rosalie", her engines, boiler, machinery, sails, boats, tackle, apparel and furniture, and that no other person or corporation has any interest therein as owner. And the said Joshua Green, as such President claims the said steamship and property in behalf of the said corporation, and prays that the same may be delivered to him for said owner.

JOSHUA GREEN,

*For The Inland Navigation Company.*

UNITED STATES OF AMERICA,	}	ss.
STATE OF WASHINGTON,		
COUNTY OF KING.		

JOSHUA GREEN, being first duly sworn, on his oath, says that the facts stated in the foregoing claim subscribed by him are true.

JOSHUA GREEN.

Subscribed in my presence and sworn to before me this 16th day of April, 1912, by said Joshua Green.

[SEAL]

ROBERT W. REID,  
*Notary Public in and for the State of  
Washington, residing at Seattle.*

Endorsed: Claim by President of Owner. Filed in the U. S. District Court, Western Dist. of Washington. Apr. 16, 1912. A. W. Engle, Clerk. By S., Deputy.

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In the District Court of the United States for the Western  
District of Washington, Northern Division.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	}	Libelant,
		<i>vs.</i>
THE TOW BOAT "TILlicum", HER ENGINES, BOILERS,	}	No. 4730
etc.,		
STIMSON MILL COMPANY, A CORPORATION,		Respondent,
		Claimant and Cross-Libelant.

*Bond to Obtain Release of Ship.*

KNOW ALL MEN BY THESE PRESENTS:

That we, The Inland Navigation Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and duly authorized to do business in the State of Washington, having a principal office and place of business at the City of Seattle, King County, Washington, as Principal, and Joshua Green, residing at Seattle, Washington, and Frank E. Burns, residing at Seattle, Washington, as sureties, are held and firmly bound unto J. R. H. Jacoby, Marshal of the United States for the Western District of Washington, Northern Division, in the sum of Two Thousand Dollars, to be paid to the said J. R. H. Jacoby, Marshal of the United States for the District aforesaid, his successors and assigns, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our, heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Scaled with our seals and dated this 11th day of April, 1912.

Whereas, a cross-libel has been filed in the District Court of the United States for the Western District of Washington,

Northern Division, on the 16th day of April, 1912, by Stimson Mill Company, a corporation, claimant and cross-libelant in the above entitled cause, against the Steamer "Rosalie," her tackle, apparel and furniture for the sum of Six Hundred Dollars, on which process of attachment has been issued, and the said ship, her tackle, apparel and furniture, is in custody of the Marshal under the said attachment, and the said The Inland Navigation Company, claimant of the said ship, has applied for the discharge of said ship from the custody of the Marshal, and has filed a claim claiming the said ship as owner, and has filed a stipulation for the claimant's costs pursuant to the rules and practice of the said court;

Now, Therefore, the condition is such that if the above bounden, The Inland Navigation Company, a corporation, its successors and assigns, shall abide by and perform the decree of this court, then this obligation shall be void, other wise the same shall be and remain in full force and virtue.

THE INLAND NAVIGATION COMPANY,  
By JOSHUA GREEN, *President*.

ATTEST: C. H. J. STOLTENBERG, *Secretary*.  
JOSHUA GREEN.  
FRANK E. BURNS.

Sealed and delivered, taken and acknowledged this 16th day of April, 1912, before me.

[SEAL]

ROBERT W. REID,  
*Notary Public in and for the State of  
Washington, residing at Seattle.*

UNITED STATES OF AMERICA, }  
STATE OF WASHINGTON, } ss.  
COUNTY OF KING. }

JOSHUA GREEN and FRANK E. BURNS, being duly sworn, each deposes and says: That he resides as above set forth, and that he is worth the sum of Four Thousand Dollars over and above all his just debts and liabilities.

JOSHUA GREEN.  
FRANK E. BURNS.

Subscribed and sworn to before me this 16th day of April, 1912.

[SEAL]

ROBERT W. REID,  
*Notary Public in and for the State of  
Washington, residing at Seattle.*



I approve of the sufficiency of the sureties to the within bond.

C. H. HANFORD, *Judge.*  
IRA BRONSON, *Proctor for Claimant.*

Endorsed: Bond to Obtain Release of Ship. Filed in the U. S. District Court, Western Dist. of Washington. Apr. 16, 1912. A. W. Engle, Clerk. By S., Deputy.

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In the District Court of the United States for the Western  
District of Washington, Northern Division.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	} Libelant,	} No. 4730
<i>vs.</i>		
THE TOW BOAT "TILlicum", HER ENGINES, BOILERS,	} Respondent,	
etc.,		
STIMSON MILL COMPANY, A CORPORATION,	} Claimant and Cross-Libelant.	

*Answer to Cross-Libel.*

The answer of the Inland Navigation Company, a corporation, Libelant, to the cross-libel of the Stimson Mill Company, a corporation, Claimant and Cross-libelant in the above entitled cause admits, denies and alleges as follows:

I.

That it admits the allegations in Paragraph One of said cross-libel.

II.

Answering Paragraph Two of said cross-libel it admits that a dense fog hung over Seattle harbor on the morning of April 8th, 1911; specifically denies that the steam tug "Tillicum" sounded its fog whistle prior to the collision as required by law; but as to the other allegations therein contained it has not sufficient knowledge or information to form a belief as to the truth or falsity thereof, and therefore denies the same.

III.

Answering Paragraph Three of said cross-libel, it admits that the "Rosalie" sounded four blasts of a whistle, and specifically denies that no fog whistle had been previously



given; denies that the captain of the tug boat gave three blasts of his whistle to indicate that his engines were going full speed astern; and denies that the said tug boat swung its bow to starboard, and denies that the tug and tow had begun to make sternway when the collision occurred, but as to the other allegations therein contained it has not sufficient knowledge or information to form a belief as to the truth or falsity thereof, and therefore denies the same.

## IV.

Answering Paragraph Four of said cross-libel the libelant denies every allegation therein contained.

WHEREFORE, the libelant prays that the cross-libelant take nothing in this suit, but that the libelant be given the relief prayed for in its libel and such further relief as in law and justice it may be entitled to receive.

IRA BRONSON, *Proctor for Libelant.*

STATE OF WASHINGTON, }  
COUNTY OF KING. } ss.

JOSHUA GREEN, being first duly sworn, on oath deposes and says: That he is the President of the Inland Navigation Company, a corporation, libelant in the above entitled cause; that he has read the foregoing answer to cross-libel, knows the contents thereof, and believes the same to be true.

JOSHUA GREEN.

Subscribed and sworn to before me this 14th day of January, 1913.

[SEAL]

W. L. GRILL,  
*Notary Public in and for the State of  
of Washington, residing at Seattle.*

Due service of a copy hereof admitted this 14th day of January, 1913.

HUGHES, McMICKEN, DOVELL & RAMSEY,  
*Proctors for Cross Libelant.*

Endorsed: Answer to Cross Libel. Filed in the U. S. District Court, Western Dist. of Washington. Jan. 24, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western  
District of Washington, Northern Division.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	}	No. 4730	
Libelant,			
<i>vs.</i>			
THE TOW BOAT "TILlicum," HER TACKLE, ENGINES,	}		
apparel, and furniture,			Respondent,
STIMSON MILL COMPANY, A CORPORATION,			Claimant and Cross-Libelant.

*In Admiralty*

*Order of Reference.*

This cause coming regularly on for hearing on the motion of the libelant for an order of reference referring the above entitled matter to a commissioner for the taking of testimony herein; and it appearing to the court that the libelant has heretofore filed its libel against the Tow Boat "Tillicum," and that thereafter upon the seizure of said boat, the Stimson Mill Company, a corporation, appeared herein as claimant and cross-libelant and filed its answer herein denying the allegations of the libel; and the court being fully advised in the premises, it is hereby ordered, adjudged and decreed that the above entitled matter be, and the same is hereby referred to A. C. Bowman, as a commissioner for the taking of the testimony herein, with directions to take the testimony herein and return the same to this court.

Done in open court this 31st day of December, 1912.

CLINTON W. HOWARD, *Judge.*  
IRA BRONSON *for Libelant.*

O. K.  
H. McM. D. & R.

(Endorsed:) Order of Reference. Filed in the U. S. District Court, Western Dist. of Washington. Dec. 30, 1912. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western  
District of Washington, Northern Division.

THE INLAND NAVIGATION COMPANY, a corporation,	Libelant,	} No. 4730
vs.		
THE TOW BOAT "TILlicum," ETC.,	Respondent,	
STIMSON MILL COMPANY,	Claimant,	
STIMSON MILL COMPANY,	Cross-Libelant,	
vs.		
STEAMSHIP "ROSALIE", ETC., Respondent,		
THE INLAND NAVIGATION COMPANY, Claimant.		

To the HON. E. E. CUSHMAN, Judge of the above entitled  
Court:

Pursuant to the order of reference herein the libelant appeared by Mr. J. S. Robinson, one of its proctors, and the claimant and cross-libelant appeared by Mr. E. C. Hughes, one of its proctors; thereupon the following testimony was offered and proceedings had:

*Libelant's Testimony.*

L. BOUGOJARD, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. Robinson). What is your occupation?

A. I am now on the "Weary Willie."

Q. Were you employed on the steamship Rosalie on the 8th of April, 1911, when she was in collision with a scow and tug?

A. Yes sir.

Q. Were you on duty at the time?

A. Yes sir.

Q. What were you doing?

A. I was lookout at the time, on the bow.

Q. On the bow?

A. Yes sir.

Q. When had you gone on duty?

A. We changed about four o'clock. I went on about 4 o'clock. We changed every two hours to take a turn at the wheel, and changed lookout.

Q. About where was the location of that accident?

A. Between West Point and Four Mile rock, I should judge; I could not tell exactly, it was foggy.

Q. Do you know about what time you passed West Point that morning?

A. I should judge a little after 5.

Q. You were bound in?

A. Yes sir, bound to Seattle.

Q. Was it very foggy at West Point?

A. Not so very, but it was good and hazy at the time, you could hardly see the light. You could make out the light house, but anybody who was not used to it could not make out what it was.

Q. Now, what was the first intimation that there was some boat ahead of you that morning?

A. I reported a whistle off the port bow, a single whistle.

Q. A single whistle?

A. Yes, one whistle.

Q. Did you report that to the officer in charge?

A. Yes sir, and he answered me.

Q. Was it possible from where you were stationed, to know what was done in the pilot house when you reported?

A. No sir, I could not tell, I was too far away.

Q. What happened next?

A. Well, about a minute or a minute and a half, I heard another whistle, single whistle, in about the same direction I should judge it was, about that time.

Q. Did you report it?

A. Yes, I reported the whistle again.

Q. Do you know what happened then?

A. I felt the boat slowing down, slowed right down at that time until I could not feel her vibrate at all.

Q. Did you make any further reports?

A. No, not at the time, that is I reported that single whistle.

Q. How long had you heard this second whistle did you see a boat ahead of you, or an object?

A. I could not tell you the time, but I heard a tow whistle and I reported the towing whistle, and a few seconds afterwards I seen the red light come in sight that was on the barge, and I seen the barge afterwards. I saw the light, it was a red light after the towing whistle, on account of getting close to us.

Q. And how was the towing done, what was the arrangement?

A. He was towing alongside.

Q. How was she lashed on the side, did she project or not?

A. Yes, she stuck out forward quite a bit.

Q. How much do you think?

A. Oh, about 20 feet, I should judge.

Q. How did you come in contact with her, did you hit her straight on or how or what did you hit?

A. We hit her a kind of a glancing blow.

Q. The barge or the scow?

A. The barge, we hit the barge a glancing blow, more of a glancing blow than it was ahead.

Q. What distance do you think you saw, at what distance from the scow did you first see her?

A. Seen the scow from the steamer?

Q. Yes.

A. I should judge about 100 feet or 150 feet. It might be more than that.

Q. During the interval when you saw her and when you came in collision, did she change her position and swing in?

A. No sir, I could not make that out. I reported there was a red light ahead, and I kind of stepped back. I seen there was going to be a collision.

Q. Do you know whether or not you had any headway when the two vessels came together?

A. No, that is we had sternway, if anything.

Q. You had sternway?

A. Yes, we were backing up all right.

Q. How do you know that?

A. I seen the foam from the wheel going right up against the scow when she hit, just under the stem, just under the stem, you could see where she was sending the water up.

Q. How long had you been on the *Rosalie* before this accident?

A. About two years, I should judge, a little less than that.

Q. Do I understand you to say that as you looked forward at the scow, as you were approaching, you could see white water from the *Rosalie's* wheel going up to the scow before you hit her?

A. Yes, before we hit her I seen that.

Q. Had you any means of knowing, from your position, as to how the engines were being handled on the *Rosalie*, just previous to the collision?

A. No sir; I could not tell how they were handled at all. I know she slowed down before the collision, and you could not feel the vibration at all, and there was no swell from it; she was making no swell.

Q. Immediately before the collision, after you saw her, could you tell what her engines were doing?



A. No sir, I could not tell.

Q. Did both vessels or either of them give an alarm whistle?

A. Yes, gave danger whistles about the same time, both together, it seemed to me.

Q. Did you hear any other whistles from the Tillicum after that?

A. No sir. Never gave any more signals at all.

Q. Now, after the vessels had come in contact, or immediately after, what was their position shortly after they came in contact?

A. The Tillicum was off our starboard beam. We kept backing away from her all the time and she swung to our starboard, and the man on watch asked him if he was all right and if he should keep on going, and she was off our starboard beam then.

Q. You spoke of hearing a towing whistle. How long was that before the collision?

A. Well, just a short time, just about the time I seen the lights, we were just over the whistle when I see the lights and seen the barge.

Q. You don't know, I suppose, of your own knowledge, at what time these various things happened?

A. No sir, I do not. I don't know the time at all.

*Cross Examination.*

Q. (Mr. Hughes). How long had you been lookout on the steamer Rosalie prior to this time?

A. About an hour and a half.

Q. But for how long a time had you been employed as lookout on the Rosalie?

A. Well, about two years, I should judge. I was night watchman at the time, I was not lookout.

Q. Night watchman?

A. Yes, we took turns about standing lookout, two hours apiece.

Q. Two night watchmen, are there?

A. There is a night watchman and a lookout.

Q. Night watchman and lookout.

A. Yes, they have to take turns at the wheel.

Q. The lookout does?

A. Yes sir.

Q. Did you take the wheel?

A. Yes, I took the wheel two hours. And then we changed about and then the watchman goes to the wheelhouse and I would go on lookout.

Q. Did not they have a quartermaster at the wheel?

A. No sir, not on that boat.

Q. You as night watchman stood at the wheel for two hours and then would act as lookout for two hours, is that it?

A. Yes, two men employed at night, one would stand lookout and one takes a watch at the wheel.

Q. These were your regular duties as night watchman were they?

A. Yes sir.

Q. Half the time at the wheel and half the time on the bow?

A. Yes sir.

Q. And you had been on the Rosalie in that capacity for about two years?

A. Pretty near two years.

Q. You had what run on the Rosalie at that time?

A. It was on the San Juan and Bellingham run.

Q. Tell us what your run was?

A. Well, she started here at 12 o'clock at night and went to Townsend and goes over to San Juan island and stops at Bellingham, and at eight o'clock in the evening came down to Seattle during the night.

Q. What time did she leave Bellingham to return?

A. Eight o'clock.

Q. And you left Bellingham on your return to Seattle at 8 o'clock at night?

A. Yes, for Seattle.

Q. Then what time did she arrive at Bellingham when she was going in there?

A. About four or five o'clock.

Q. Four or five o'clock.

A. Yes sir.

Q. And she would leave at eight o'clock that night.

A. Yes sir.

Q. And go back again over the San Juan island route?

A. Yes, she came direct to Seattle in the evening, came right through to Seattle.

Q. By what route?

A. Through the outside or through the pass, through Deception pass if the tide permitted.

Q. She goes through Deception pass?

A. Yes at times; most of the time she goes outside in the Straits, she would go by Port Townsend.

Q. Which way did she go that night?

A. She went outside that night, by Townsend.

Q. Did she call at Townsend?

A. No sir, she did not stop at Townsend.

Q. Did she stop anywhere after leaving Bellingham?

A. Yes, she stopped at Anacortes.

Q. She stopped at Anacortes.

A. Yes sir, that is one of the points of call.

Q. She came from Bellingham to Anacortes?

A. Yes.

Q. What time did she leave Anacortes?

A. I could not tell you, I do not know.

Q. Then from Anacortes did she go over to Port Townsend?

A. No, she came direct to Seattle.

Q. By which route?

A. By Port Townsend, outside, we went by Townsend, outside.

Q. What pass does she go through to go from Anacortes, to go to Admiralty Inlet, is it?

A. Yes, she comes through Admiralty Inlet into Rosario Straits.

Q. Did she go over through Rosario Straits after leaving Anacortes that night?

A. Yes, she came through part of that, as far as Partridge, and from Partridge down to Admiralty Inlet, and then inside.

Q. Which side of Smith's island did she go?

A. On the inside of Smith's island, between Whidby and Smith island.

Q. Then down Admiralty inlet?

A. Yes sir.

Q. Do you know how many miles it is by that route?

A. I should judge about 90 from Bellingham to Seattle?

Q. By that route.

A. Yes, I should judge somewheres like that. A little less, may be.

Q. What time were you due in Seattle?

A. She was generally due about six o'clock; sometimes a little early and sometimes a little late.

Q. Were you late that night?

A. No sir, just about on time.

Q. Making regular time?

A. Yes. We did not have any freight at Anacortes and we got out on time.

Q. Are you sure you got out on time from Anacortes?

A. I think so. We would not have been down that far if we had not.

Q. Was it foggy that night all the way?

A. No sir, just started at Apple Tree, got hazy at Apple Tree point.

Q. From Apple Tree point to Seattle was foggy?

A. Yes, hazy; at West Point it came down thick and from there it was foggy all the way into Seattle.

Q. Could you see the West Point light?

A. I could just see part of it, just the top of it, you could not make out what it was.

Q. Could not make out the light?

A. No sir, you could not make out the light. You could see the bluff over the top of the light.

Q. It was too foggy to see the house?

A. No sir. It was a low fog right at West Point, the fog was hanging awfully low; you could see right over the top.

Q. Did you report West Point light?

A. Yes, reported West Point light. I reported the horn, the horn was blowing.

Q. You could tell the horn?

A. Yes, I could tell the horn.

Q. Did you take a note of the time it was?

A. No sir, I could not, I was on the bow at the time.

Q. You said a while ago that it was about five or a little after five when you passed, how do you know?

A. I judged that was the time, because we passed Apple Tree about forty-five minutes or an hour, I went on watch at Apple Tree, and I should judge it was about five o'clock.

Q. You changed watch at five o'clock?

A. No sir, off Apple Tree.

Q. What time was that?

A. I could not tell you to be sure what time it was. I did not look.

Q. You ought to know when you went on watch?

A. Sometimes a little later and sometimes a little earlier; we were not particular about changing.

Q. You had been on the lookout from the time you left Apple Tree?

A. Yes sir.

Q. Who fixes the time in your log of passing these various points?

A. The officer on watch, who ever is on watch.

Q. Who was on watch that night?

A. The mate was on watch.

Q. What is his name?

A. Captain Hanson.

Q. Captain Hanson?

A. Yes, Andy Hanson.



Q. He was mate and he was on watch?

A. Yes he was on watch at the time.

Q. Where was he?

A. He was in the pilot house. He had the windows down, he was hanging out of one of the windows, he was looking out of the windows.

Q. The other lookout was at the wheel in the pilot house?

A. Yes, he was steering.

Q. Anybody else in the pilothouse?

A. No sir, just two men in the pilothouse that I know of.

Q. How far were you forward of the pilothouse?

A. Well, about 20 feet.

Q. About 20 feet?

A. Yes, right on the bow.

Q. How far were you back of the bow of the boat?

A. Well, about five feet.

Q. It was only about 25 feet from the pilothouse to the bow of the Rosalie?

A. Yes sir. Just about.

Q. Has the Rosalie two decks?

A. Yes sir.

Q. This was the upper deck, was it?

A. No sir, the middle deck. I was on the saloon deck, the passenger deck. I was forward on the passenger deck.

Q. And has she a deck below that?

A. Yes, she has a maindeck.

Q. Well, the bow of the maindeck is much further forward?

A. No sir, it runs right up, it is housed up to the saloon deck.

Q. How high was it above the water, the saloon deck?

A. I should judge about 12 or 15 feet.

Q. Had you been standing out there all the time or had you been back in the pilothouse part of the time?

A. No sir, standing there since Apple Tree, I was there at the bow since Apple Tree.

Q. What reports had you made after you went on the lookout up to the time of the collision?

A. I reported West Point horn; I reported one single whistle off the port bow, then another whistle off the port bow, then I reported a towing whistle.

Q. Now before passing West Point had you reported anything, passing any other ship?

A. No sir, had not seen any other ship at all.

Q. The first thing you reported after you went on the lookout was West Point horn?



A. Yes sir, the horn.

Q. How long after reporting that was it until you heard the whistle off your port bow?

A. I could not tell you the time at all.

Q. Well, about how long, 10 minutes?

A. No, I don't believe it was that long; I don't believe it was over five minutes. It was only a short while.

Q. Well, did you report the first whistle that you heard?

A. Yes sir, I reported the first whistle that I heard.

Q. Did not you hear a fog whistle further away before you reported that?

A. No sir, that is the first whistle that I heard.

Q. You could not see any vessel when you first heard the whistle?

A. No sir, could not see anything.

Q. About how far did it seem to you to be away?

A. I could not tell you that.

Q. What report did you make, what did you say?

A. I reported a whistle off the port bow.

Q. Well, what was it you said?

A. Just what I told him, I reported a whistle off the port bow, that is all I could do, that is all I heard, the whistle.

Q. Was that one whistle?

A. Just one whistle.

Q. Now about a minute after that you heard another whistle?

A. Yes, same kind of a whistle, and I reported again.

Q. Do you remember what it was you said that time?

A. I reported a whistle off the port bow, again.

Q. You said "Whistle off the port bow"?

A. Yes.

Q. That is what you called it?

A. Yes, whistle off the port bow.

Q. You still did not see any lights?

A. No sir, could not see a thing.

Q. Could you tell by the sound about how far distant it was?

A. I could tell it was coming closer; I could not tell how far it was.

Q. Had you an idea how far away it was?

A. No sir, I had not.

Q. After reporting that second whistle what was the next?

A. I heard three whistles, one long and two short whistles. I reported that it was a towing whistle.

Q. Where was that, on your port bow?

A. Yes, just about, it was coming ahead of us, getting more on the head.

Q. But still somewhat on your port bow?

A. Yes sir.

Q. Seemed to be closer, did it?

A. Yes sir.

Q. About how long was it after the second whistle you reported was it until the three whistles, the long and two short whistles that you heard?

A. I should think about half a minute; it may not be that long. It was a short interval.

Q. What was the next whistle that you heard after that?

A. They were blowing the danger whistle.

Q. Who blew the danger whistle?

A. The Tillicum blew a danger whistle.

Q. The Tillicum?

A. Yes, both blew.

Q. How long was it after you heard the long and two short whistles until the danger whistle was blown?

A. Well, it was only a short time; I could not tell you the time.

Q. Think it was half a minute?

A. I don't think it was. Just as soon as she blew the towing whistle I could see the light, and I reported a red light.

Q. After the one long and two short whistles, you called that a towing whistle?

A. Yes sir.

Q. And soon after that you saw a light ahead of you?

A. Yes sir, red light.

Q. That was still a little on your port bow?

A. Yes sir, it was dead ahead of us, the red light was.

Q. By the time you saw the red light it was dead ahead?

A. Yes sir.

Q. You saw one red light?

A. Yes sir.

Q. That is the only light that you saw?

A. That is the only one I saw.

Q. Did you report that light?

A. Yes sir.

Q. What did you report?

A. Reported red light dead ahead.

Q. You reported a red light dead ahead?

A. Yes sir.

Q. You are sure you reported it that way, are you?

A. Yes sir.

Q. After reporting the red light, how long was it before you heard the danger signal?

A. He blew a danger signal just as we struck, just as we had the collision, he blew a danger whistle.

Q. How long after you saw the red light was it before the danger whistle?

A. No time at all. I could not tell you the time; I stepped back a little.

Q. You say you saw a light and saw the scow too, didn't you after you saw the light?

A. Yes, I saw the barge loom up.

Q. You saw the light a little before you saw the loom of the barge?

A. I saw the light first, and the light was on the other end of the scow.

Q. You saw no light on the Tillicum at all?

A. No sir, not until after I had seen the scow, then the lights of the Tillicum loomed up.

Q. When you saw the scow you testified a while ago that she was about 150 feet away from you.

A. Yes, I should judge about that, or the light was, rather.

Q. About that time you could see the Tillicum loom up and see her lights, could not you?

A. Just a little after that.

Q. After you saw the scow.

A. Yes, I seen the light on the scow first.

Q. What light did you see on the Tillicum?

A. I seen the red light and her two lights, that is all I could see.

Q. Two red lights.

A. And those forward on the main mast.

Q. And how soon after you saw the Tillicum's lights, the two lights forward and mainmast light was it that you heard her blow her danger signal?

A. I could not tell you about the time, because that happened very quick.

Q. That was four blasts of the whistle?

A. Yes, four danger blasts.

Q. Immediately after that your ship gave four blasts?

A. Yes, just about the same time, just about the time the Tillicum made them our ship answered right away, gave about the same time.

Q. Could you see your ship change its course at all during this time?

A. No sir, I could not tell.

Q. When you saw the Tillicum, after seeing the barge by the side of it, you realized that they were so close and coming towards each other, that there was going to be a collision?

A. Yes sir.

Q. You rushed back?

A. About four or five feet. I went back about ten feet.

Q. Did you go clear up to the pilot house?

A. No sir, I did not go that far. I stood pretty well forward on the bow and I stepped back about 10 feet right from the hatch; there is lots of room. I was forward of that gang way. I thought I would step back of that gangplank.

Q. And you stayed there until after the collision, did you?

A. Yes. Stood right up there and went up forward after that.

Q. Were you right in the center of the ship from one side to the other?

A. Yes sir, practically; there is a couple of feet on each side to walk by, across there there is lots of room to walk on either side of it.

Q. Now in your position you could not tell anything about how the waves were, with the dense fog that was on the water, could you?

A. What waves do you mean?

Q. You could not tell about the wash of the sea around your ship, could you?

A. It was only white foam all around the bow; I stepped to one side and looked and I saw the white foam.

Q. By that time the two vessels were right together?

A. Just about that time the foam was going up against the scow, it seemed just white all around.

Q. White all around the scow, and you could look down ahead of you and saw the white foam all around the scow?

A. Yes, in front of the scow.

Q. And around the bow of the Tillicum?

A. I could not tell that. I did not look. I only seen the scow.

Q. Was not the scow swinging to starboard?

A. I could not tell if she was swinging around, I could not tell.

Q. Where did the bow of your ship strike the scow, in front part of the scow?

A. Just pretty near on one side.

Q. Near the port corner of it, near the port side?

A. No, to starboard.

Q. Between the Tillicum and the scow?

A. Yes, I think so, just about.



Q. Did it break into the scow at all?

A. I could not tell you.

Q. How long was it before they pulled apart?

A. Just about a second. No time at all, just hit and bounced right back. No time at all.

Q. Both drew away.

A. Yes.

Q. Did your ship back away or did she go on?

A. No, she kept backing. She kept going back; the foam kept coming all the time.

Q. How long did she keep going back?

A. I could not tell you.

Q. How far did she get away from the Tillicum?

A. I should judge about 100 feet, or a couple of hundred feet I should think. It is hard to judge the distance in a fog.

Q. Did you notice when she started ahead again?

A. Yes sir.

Q. Was the Tillicum lying still there in the water while you were backing away from her, before you started ahead again?

A. She looked like she was lying still.

Q. Did your officer speak to the captain of the Tillicum?

A. Yes, he talked to the captain of the Tillicum and asked if he was all right, and he reported that he was all right.

Q. Did he ask you whether you were all right?

A. I could not tell you that; I did not hear it.

Q. Do you remember whether your mate, your officer on deck, made any answer to him as to whether he was all right, or safe, or not?

A. He reported all well to them.

Q. How long was it before you started ahead and went on towards Seattle?

A. I should judge about three or four minutes; may be we laid there before we got straightened up again.

#### *Redirect Examination:*

Q. (Mr. Robinson). You were in a position where you could see the port and starboard lights on the Rosalie?

A. Yes sir.

Q. Were they burning?

A. Yes, they were burning. I generally look back about every ten minutes or fifteen minutes, I would look and report.

Q. Was the Rosalie sounding fog signals after she passed West Point?

A. Yes sir, pretty regular.



Q. How do you mean, pretty regular, about how often?

A. I should judge about every half minute for a while.

Q. (Mr. Hughes). When she first passed West Point, you think she was sounding fog whistles every half minute?

A. There for a while she was blowing pretty regular for a while.

Q. Why did she quit blowing regularly?

A. She blowed every minute from there on trying for an echo.

Q. You had not got far enough down to begin to try to get an echo?

A. Yes sir.

Q. You were not near enough to the bluff to try to get an echo?

A. Yes, I think so.

Q. How long had you been running past West Point light?

A. I don't know how long, a few minutes I should judge, something like that.

Q. You would not look for an echo from the bluff until you got in the neighborhood of a mile or more this side West Point light, would you?

A. Yes, I would.

Q. It is a long ways off from the bluff; the bluff comes down low, don't it?

A. It comes down to a bluff, but you don't run far past the light.

Q. You do not begin to get an echo on your way into Seattle until you get a mile or a mile and a half past West Point light, do you?

A. Yes sir, I think we do.

Q. How soon do you, after you pass West Point light?

A. I could not tell you.

Q. Do you know what course she steered past West Point light to Seattle?

A. Yes sir.

Q. What?

A. South east by east on the Rosalie; that is on her course.

Q. The Rosalie's course from West Point light you steer south east by east?

A. Yes, just about that course. I don't know what they were steering that night, that is the regular course to steer, that is, from the light to Four Mile rock.

Q. That is from the light to Four Mile rock you steer south east by east?

A. Yes sir.

Q. I have asked you to tell me all the whistles that you heard. Have you told me all the whistles that you heard?

A. Yes sir, all the whistles that I heard.

(Testimony of witness closed).

CAPT. ANDY HANSON, a witness called on behalf of the libellant, being duly sworn, testified as follows:

Q. (Mr. Robinson). Mr. Hanson, what is your occupation?

A. Sometimes master, sometimes mate.

Q. What kind of a license have you, captain?

A. Ocean license.

Q. How long have you had it?

A. Oh, I have had an ocean license for about ten years and I have had a license for Puget Sound about 22 years, something like that.

Q. How long have you been going to sea?

A. Going to sea all my life, ever since I was twelve years and a half old.

Q. Captain, were you navigating the *Rosalie* on the morning of the 8th of April, 1911, when she was in collision with the scow and tow of the *Tillicum*?

A. Yes sir.

Q. Where were you bound, captain?

A. Bound to Seattle.

Q. And about where did this collision happen, as near as you can place it?

A. Well, about three-quarters on this side of West Point.

Q. About three-quarters of a mile this side of West Point?

A. Yes sir.

Q. Captain, was there a heavy fog when you passed West Point?

A. No sir, it was quite a fog, but I could see the lights from the pilothouse.

Q. Was there any change in the fog as you came into the harbor?

A. Yes, just as we came by it set in thick then with fog.

Q. Do you know what time you passed West Point light?

A. 5:05 in the morning.

Q. Who was at the wheel?

A. Harry Gates.

Q. And did you have a man on the lookout on the bow?

A. Yes sir.

Q. Who was that?

A. Lee Bougojard.

Q. Where were you?

A. In the pilot house.

Q. Were the windows up or down?

A. The windows were down, sir.

Q. Did you sound your fog whistle after passing West Point light?

A. Yes sir.

Q. About what intervals?

A. Oh, about every half minute or less.

Q. Did you hear any whistles ahead of you, captain, after passing West Point light?

A. Well, not when I passed, but after three minutes I heard a whistle ahead.

Q. Was that reported by the lookout?

A. Reported by the lookout.

Q. What did you do then?

A. I stopped the boat.

Q. You stopped the boat?

A. Yes.

Q. You mean you stopped the engines?

A. I gave the signal to the engineer to stop the engines.

Q. What did you do?

A. I was drifting along there for about a minute.

Q. Then what?

A. I did not hear any more whistles and I started ahead. Just at the time I started ahead I heard a whistle again and so I stopped her and backed her.

Q. How long were you running ahead when you speak of starting ahead?

A. Oh, just about two seconds, just rang the bell when he reported another whistle and I stopped her and backed her.

Q. Then what did you see or hear next?

A. I kept on blowing whistles pretty close all the time to try to locate him because the boat sounded to be ahead but I did not get any answer to anything so I kept on backing. I thought it kind of strange that I did not hear none, so I backed about two minutes I guess, then I heard a tow whistle right ahead and right after that I heard the danger signal.

Q. When did you see anything ahead after that time?

A. I saw a red light just about the time they blowed their danger signal and a glimpse of a red light and I blowed at the same time I seen that.

Q. About what time did you come in collision?

A. 5:10.

Q. About 5:10?

A. Yes sir.

Q. How long captain, to your best judgment, do you think

you had been backing your boat before you came in contact with that scow?

A. Backing about a minute.

Q. But you did not have any headway at the time that you came in contact with the scow?

A. No sir, we had sternway.

Q. What is your reason for saying that?

A. I have been on there a long time, and I know pretty well how long it will take her to back after we stop her.

Q. Well, have you any other reason for thinking you had sternway?

A. Well, I looked out after we came close to her, and I seen the white foam on the side coming from the stern of the *Rosalie*.

Q. How long had you been on the *Rosalie* previous to the happening of this accident. How much time had you put in on her as navigating officer, do you suppose?

A. Well, I have been navigation officer on the *Rosalie*, altogether I suppose about five or six years, but not all at one time.

Q. Altogether?

A. Yes sir. Probably a little more or a little less, you know.

Q. Captain, did you hear more than one towing whistle?

A. No sir.

Q. Just one. How was the tug lashed to that scow, captain, which side was she on?

A. She was on the port side of the scow—the scow was on the port side of the boat.

Q. The scow was on the port side of the boat?

A. Of the *Tillicum*, yes.

Q. Did you notice whether the scow projected ahead of the bow of the *Tillicum*?

A. Yes, it must have projected a matter of 20 feet.

Q. Did you notice whether the stern of the *Tillicum* projected beyond the stern of the scow?

A. I did not notice that.

Q. What conversation did you have with anybody on that scow or tug after the collision, did you stop and talk to them?

A. No, we did not talk except we asked if they were all right and they reported O. K.

Q. How far do you think you could see her when you first saw the scow, how far were you from her, do you think?

A. We could not have been over 75 or 100 feet at furthest.

Q. During the time when you did have her in sight, could you notice whether she was swinging the scow?



A. No sir. She was dead ahead when I saw her; I did not see her swing.

Q. Did you ever work on tow boats, that is towing in the fashion that this scow was towed?

A. Yes sir.

Q. That is lashed on the side and the scow sticking out in front?

A. Yes sir.

Q. What would be the effect then, captain, if the Tillicum was running her engines astern, or had sternway, what effect would that have on the scow, what direction would it give her?

A. She would swing to port. A towboat when she has got anything on the side and ahead of her that way, a ship or a scow or anything, the minute you back her, you swing into the scow, the way the scow is, the side the scow is. If she had swung she should have been on our port side after we were through.

*Cross Examination:*

Q. (Mr. Hughes). Captain, when did you go on duty that night?

A. At one o'clock, sir, in the morning.

Q. Who was the captain of the Rosalie then?

A. Captain Sam Barlow.

Q. And you were the first officer, were you?

A. Yes sir.

Q. Were you on duty when you left Bellingham?

A. No sir.

Q. Where were you, captain, at that time?

A. I was abed.

Q. Who was on duty from then until 1 o'clock?

A. Captain Barlow.

Q. You were called and went on duty at one.

A. I am called at half past 12 and go on duty at one, yes.

Q. Did you go to Anacortes that night?

A. I was not on duty when they went to Anacortes.

Q. Was your trip made that night by way of Anacortes?

A. Yes sir it was made by Anacortes.

Q. You went down there inside to Anacortes?

A. You mean from Bellingham?

Q. Yes. How did you go from Bellingham?

A. Captain Barlow was on duty; I was not on duty.

Q. Do you know what the regular route was?

A. I do.

Q. Do you know what route they took?

A. I could not say what route they took when I am not on duty.



Q. You don't know, but you knew what was the regular route when you went to Anacortes?

A. Yes, I do know.

Q. You know what is the regular route when you come from Bellingham by way of Anacortes?

A. We come the inside route by Clark Point and Cypress island and Williams light.

Q. What route did you take from Anacortes to Seattle?

A. That night we took the outside passage across the Straits.

Q. What way did you go across from Anacortes to Rosario straits, through what pass?

A. There is no pass at all. We came through the Bellingham channel and from Anacortes we crossed the mouth of Rosario straits, and we go close to the strait of Juan de Fuca.

Q. Cross part of the straits of Juan de Fuca?

A. Yes sir.

Q. And from there you come down Admiralty inlet toward Seattle?

A. Yes sir.

Q. Where was it you went on duty?

A. I went on duty at one o'clock. I have forgotten now where, but somewhere about Admiralty inlet—no, somewhere about Partridge point.

Q. Partridge Point?

A. Yes, between Partridge Point and Marrowstone Point.

Q. Well, she was below Marrowstone Point somewhere, was she?

A. Yes sir.

Q. Was your boat on time?

A. Pretty regularly on time.

Q. Was she that night on time when you went on deck?

A. Well, she was pretty well on time, yes. Sometimes we get a little earlier or a little later.

Q. But that night, were you on time when you took charge, when you went on deck?

A. The boat might have been a few minutes late.

Q. Did you have any fog when you first came on deck?

A. No sir.

Q. When was it you say you first encountered fog?

A. We encountered fog about Apple Tree, began to get hazy, no fog, but hazy.

Q. Well, when did you first begin to get more or less fog on the water?

A. Well, it set thick fog after we passed West Point.

Q. Did you have any fog before you came to West Point?

A. From Apple Tree we had a little haze.

Q. Was there enough fog for you to give your fog whistle between Apple Tree and West Point?

A. Yes, one place there was a little fog and I blew the whistle.

Q. Are you sure you blew the whistle at all between Apple Tree and West Point?

A. Yes sir.

Q. I mean fog whistle?

A. Yes sir. A couple of times, not all the time.

Q. You did not have much fog, you say, at West Point, you could see the light?

A. I saw a glimpse of it, yes.

Q. Did you hear the fog horn at West Point?

A. Yes sir.

Q. Did you give any signal passing West Point, yourself?

A. I blew a fog whistle.

Q. How soon after passing West Point did you blow a fog whistle?

A. I blew a fog whistle before coming to West Point.

Q. I thought you said there was not much fog?

A. There was a haze. We blow a fog whistle when there is haze, too.

Q. Did you pass any vessels?

A. No sir.

Q. Did you blow the fog whistle yourself?

A. Yes sir.

Q. You did that yourself?

A. Yes sir.

Q. What kind of a whistle have you?

A. We have a regular steamer whistle. A good one.

Q. Do you know how many whistles you blew after passing West Point before you had this collision?

A. I cannot count the whistles but I blew every half minute or less.

Q. When did you begin to blow in the fog after passing, to get an echo from Magnolia bluff, how soon after passing West Point?

A. I did not blow any whistle to try to get an echo; we were not far enough.

Q. You were not far enough?

A. No sir.

Q. You say your lookout reported a whistle on the port bow?

A. He heard it on the port bow, he said.

Q. How long after you passed West Point light was that?

A. Well, we were about three minutes.

Q. Did you make any note of it?

A. Yes sir.

Q. You entered it in your log?

A. Yes sir.

Q. When did you make that entry?

A. I made the entry when I stopped the boat.

Q. Right there at the point of collision?

A. No sir, when I stopped the boat.

Q. Did you have your book when you made the entry?

A. The book right here. All I have to do is to turn and put it down.

Q. Have you got your log book with you?

A. I think the captain has the log.

MR. HUGHES: Let me see it, captain.

(Log book produced by Captain Barlow.)

Q. Did you make the entries in this log yourself?

A. Yes sir. Part of it I made. I think Captain Barlow wrote down some afterwards, I am not certain. I have not seen it for about two years.

Q. You have not seen it for two years. Look at it and tell me which part you wrote and which part Captain Barlow wrote?

A. Yes, I will do that. I wrote this here and Captain Barlow wrote the other.

Q. When you say "this here," you mean the part which I inclose with a lead pencil circle?

A. Yes sir.

Q. Now the part which is inclosed with a lead pencil circle you say you wrote?

A. Yes, that is my writing.

Q. That that I have got marked around with lead pencil is your writing.

A. It looks like my writing. There is nobody changed it since I wrote it.

Q. It looks as if somebody had changed it, erased it, do you know anything about that?

A. No sir. You see I always put it down here before, in fair weather.

Q. What is that that you put down. What else is there on this same page that you wrote in your handwriting.

A. All this here.

Q. All of this?

A. Yes sir.

Q. You could not write what is down here very well before you came on duty?

A. Haven't I been on duty?

Q. You don't say you put down there 9:27 and 9:47, which entries are in your handwriting?

A. Here is mine, Marrowstone.

Q. You put down this 1:02?

A. The captain wrote that just when he left me.

Q. Now this Marrowstone, is that in your handwriting?

A. Yes sir.

Q. That looks very much like the same handwriting as that above it.

A. No sir.

Q. Beginning at Marrowstone, 1:50, you wrote that?

A. Yes sir.

Q. 2:26 Bush Point, did you write that, is that your writing?

A. Yes sir.

Q. 3:20, the next entry, Point-No-Point, you wrote that, did you?

A. Yes, that looks like my handwriting, yes sir.

Q. 4:50?

A. All them figures is mine.

Q. 4:00 Apple Tree?

A. Yes sir.

Q. That is your handwriting?

A. Here is four o'clock, yes sir.

Q. The next entry 4:20, President?

A. Yes sir.

Q. You wrote that?

A. Yes sir.

Q. Next entry 5:05 West Point?

A. Yes sir.

Q. You wrote that?

A. Yes sir.

Q. Now this looks as if there had been an erasure there. Did you make any erasure under the date of 5:05?

A. I did not make any alteration.

Q. Are these your figures, 5:05?

A. Here are my figures, yes.

Q. Did you make these figures 5:05?

A. Yes sir.

Q. Looks as though something had been erased, lead pencil erasure, did you do that?

A. No sir.

Q. Next entry 5:24 Four Mile Rock?

A. Yes sir.

Q. Now these particular figures, 5:07 stopped. 5:08



backed, are not written in regular order but written on one side on this page?

A. The reason of it I had to fill this up before I came there, I put down the places so as to put down the time.

Q. Then you did not make these entries on the right hand side until after you made the entries 5:25 Four Mile Rock?

A. 5:25 is afterwards, after we passed Four Mile Rock.

Q. But I say you made these other entries on the right hand side here after this page had been filled?

A. No, they were not filled except I had put down Apple Tree and West Point and Four Mile Rock and Seattle, I put that down ahead of time. I did not put down the course, I put that down as I came along.

Q. Why did not you put down this 5:07 and 5:08 in the regular order?

A. I could not, I had filled it up so that I could not do that.

Q. You had filled it up when you put this down?

A. Not the numbers. I had the places filled in, not the numbers, not the time. I could not put it in there except I rubbed it out, that is why.

Q. Do you know who made these erasures under these entries that you have here, fixing the time of stopping and backing, do you know who made the erasures?

A. I put that down myself.

Q. Do you know who made the erasures?

A. Who erased that?

Q. You do not know.

A. I put that down.

Q. Where did you get the time?

A. Off the clock.

Q. Did you put that down at the time when the thing occurred; did you look at your watch?

A. No, I looked at the clock. We have a light resting right on the clock, lighted all the time so that it don't interfere with the other and we can turn around and see the clock.

Q. Now you heard the report from your lookout saying that there was a whistle on the port bow, and then another whistle on the port bow, is that right?

A. Yes sir.

Q. Did you hear the whistle yourself?

A. Yes sir.

Q. Where did it seem to you? How near to you?

A. A long way off when first blown.

Q. What did you do?

A. I stopped the boat.



Q. Why did you stop the boat if it was only a whistle a long way off?

A. Because it sounded right ahead of us.

Q. Your lookout called the whistle on the port bow?

A. I heard it myself and it sounded to me to be right ahead.

Q. If it was a long way off there was no occasion for stopping?

A. Yes there is, for if two boats come running full speed toward each other it don't take long to come together.

Q. Were you running full speed?

A. I was running at moderate speed.

Q. Well, you said a moment ago that if two boats were running full speed it would not take long. Why did you stop if the whistle was a long way off ahead of you?

A. Because we take precautions so as to be sure and not get together.

Q. The mere fact of your hearing a whistle some distance ahead of you don't make you stop altogether?

A. Yes, I do, every time.

Q. Stop your engines completely?

A. Stop the engines completely, that is to get her located and be sure where she is.

Q. What signal did you give?

A. I was blowing one whistle all the time.

Q. The signal you gave to stop the engines?

A. I gave first one and then another. First one to slow down and then another to stop.

Q. How long were they apart?

A. Oh, they were close together, pretty close together.

Q. How long was it then before you heard the next whistle?

A. Oh, it must have been a minute or a little over.

Q. When was it that you backed, after you heard the second whistle?

A. After I heard the second whistle.

Q. That was some distance ahead too, was it?

A. Sounded pretty well ahead, yes.

Q. Why did you back?

A. Because she was coming closer.

Q. Why didn't you go off to starboard if she was apparently on your port bow?

A. I had no right to change my course in a fog before I know. She may go to starboard if I do, and if I go to port she may go to port.

Q. What is the speed of your boat?

A. Well, about nine and a half full speed.

Q. What speed did you have to make, to make your regular time between Bellingham, with the stops you had that night?

A. Well, it is depending on the tide.

Q. On the tide.

A. Sometimes we make it in eight hours, sometimes in nine hours and sometimes make it less.

Q. This night you made it in how many hours?

A. I did not notice when we left Anacortes.

Q. Your ordinary speed is nine and a half knots?

A. About that, yes.

Q. Now did you change your course at any time?

A. Depends on what you mean.

Q. I mean before the collision, did you change your course?

A. I did not change it after I left West Point.

Q. That is what I mean. Now, did you back your engines before you heard the second whistle?

A. I backed when I heard the second whistle.

Q. How long was it after you heard the second whistle before you heard the next whistle?

A. Oh, it must have been about a minute and a half, I guess. Something about that.

Q. Did you give any whistles in the meantime?

A. I was blowing one whistle all the time.

Q. What time?

A. Well, I will say about every half minute or less, to try to locate where the other boat was.

Q. You heard one fog whistle?

A. Yes sir.

Q. Then you heard another fog whistle just about a minute later and then you backed?

A. Yes sir.

Q. Now then, between these whistles, did you give any whistles?

A. I was blowing a fog signal every half minute or less.

Q. One blast of your whistle?

A. Yes. In the meantime between stopping and backing her you see I did not hear any whistle and so I started ahead and about the time I started ahead I heard a whistle and then I stopped and backed her.

Q. You did not make a note in this log book of starting ahead?

A. No, there was no need of it.

Q. Just as much need of that as making the note of stopping and backing?

A. No, she had not started ahead; she had started the engine when I stopped and backed her.

Q. After hearing the first whistle you stopped?

A. Yes sir.

Q. Gave a slow bell and then a stop bell, and then before you heard the second whistle ahead of you, you gave a bell to go ahead again, did you?

A. Yes sir, just about the time.

Q. Then you heard the second fog whistle?

A. Yes sir.

Q. Then what did you do?

A. I stopped her.

Q. Give the signal again to stop.

A. Stop and back her.

Q. And followed that with the signal to back?

A. Yes sir.

Q. Now in the meantime, it was a minute or more before you heard the next whistle ahead of you, is that right?

A. Probably not quite a minute, or about a minute, from the time I heard the first whistle until I heard the second.

Q. I am speaking of the time when you heard the second whistle until you heard the third whistle, the towing signal?

A. The towing signal was about a minute and a half or two minutes, closer to two minutes.

Q. Now between the second fog whistle and the towing whistle did you hear any other whistle from the Tillicum ahead of you?

A. No sir.

Q. Did you give any whistle at all?

A. I was giving one whistle. I was blowing my fog whistle.

Q. Did not give any other whistle at all?

A. No sir.

Q. Did you give any whistle after you heard her towing whistle, the three whistles, a long and two short?

A. When he gave the towing whistle, just about that time the light showed up, she was blowing a danger signal and I blew the danger signal.

Q. Now when you backed, why did not you give a signal that you were backing, so that she would know what you were doing?

A. I did not know how far she was. I was backing for protection. I could not tell where she was, she might have been a mile or she might have been a hundred feet from there.

Q. Well, when you saw her lights, why didn't you blow a danger signal?

A. I blew a danger signal then.

Q. You did not blow a danger signal until after he blew?

A. We blew about the same time, as soon as the lookout hollered.

Q. If you were giving fog signals, how could he know what you were doing, unless you gave him a signal to let him know that you were going astern? You did not give such a signal, did you?

A. We gave the danger signal to him. I was going astern when I gave the danger signal.

Q. But you did not give a danger signal until after he gave the danger signal?

A. Just at the same time.

Q. How quick after that danger signal did you run into her?

A. I did not run into her at all, she ran into us.

Q. How soon did you come together then?

A. Could not have been any time at all from the time I gave the danger signal and he gave the danger signal, we came together—no time at all.

Q. How far back was she when you saw her lights?

A. She could not have been over 75 or 100 feet away.

Q. Could you see the tow or the tug, either of them, before the collision?

A. I saw a glimpse of a red light, that is all I saw.

Q. Did not you see the vessel before the actual collision, before they came together?

A. I saw the loom of the scow; I could not see exactly what it was.

Q. Did you get a view as soon as you struck? Did you go forward?

A. No sir, I kept right in the pilot house.

Q. Could you see from your pilot house where you struck the scow?

A. No sir. I saw her strike in the head, I could not see what damage or what part.

Q. Now you have already told that the scow was made fast on the port side of the tug?

A. Yes sir.

Q. You have already testified that the scow extended forward of the bow of the tug?

A. Yes sir.

Q. About 20 feet.

A. Yes sir, something like that.

Q. When did you see that?

A. That is what I first saw when I saw the red light, I saw the loom.

Q. How could you tell she was on the port side of the tug,



how could you tell that she was extending forward of the bow of the tug, unless you could see her?

A. I saw it when we came together, that is the time I saw it.

Q. That is what I asked you. How did you come together, what part of the scow came in collision with the bow of the *Rosalie*?

A. The head of the scow, square scow, the head of the scow came in contact with the stem of the *Rosalie*.

Q. Which part of the head of the scow, port or starboard side of the scow came?

A. Looks to me to be about the middle. I could not tell. I was on the upper deck. I did not go down to look, I was in the pilot house.

Q. Could you tell which way the scow was swinging just before you came together?

A. Could not be swinging at all, because the bow of the scow was coming right for us. I don't think she was swinging at all.

Q. Could you see her enough to tell?

A. No, only the loom, could only see the loom.

Q. How soon did you pull away from the scow?

A. As soon as we—I stopped the boat—just the second we were together.

Q. What do you mean by saying you stopped the boat?

A. I stopped her turning. I was still backing when we struck.

Q. You did not stop the *Rosalie* until you backed away, did you?

A. I stopped her as soon as we were clear of her, then I stopped her.

Q. How long was that after the collision?

A. It was only a few seconds.

Q. Where was the tow and the *Tillicum* at that time?

A. She drifted over to starboard of us.

Q. She was drifting, was she?

A. I don't know whether drifting.

Q. Which way does your boat turn when you back?

A. Oh the boat will turn to port.

Q. Your boat backs to port?

A. Yes sir.

Q. Do you mean to say her bow will turn to port?

A. The bow will turn to starboard.

Q. Her bow will turn to starboard?

A. Yes sir.

Q. When you back her bow will turn to starboard.



A. Yes sir.

Q. Without changing the helm at all?

A. Yes sir.

Q. Now you say you have had large experience with towing boats, and with tows that are made fast alongside and forward. How do you say the Tillicum would swing if she were to back with a tow made fast to her port side?

A. If she backed she will be swinging to starboard.

Q. Of course.

A. Yes.

Q. If she backs with a tow on her port side? You mean if she has a tow made fast on her port bow, ahead of her port bow, if she backs—

A. Her stern will turn the way the scow is.

Q. Her stern will turn to starboard?

A. Turn toward the scow, the side the scow is on.

Q. Her stern will turn which way?

A. The boat's stern will turn toward the way the scow is.

Q. Turn on the side the scow is?

A. Yes sir.

Q. Her stern will swing to port?

A. The way the scow is.

Q. That will be to port will it not?

A. What do you call to port?

Q. Her stern will swing to port.

A. Yes sir.

Q. That will swing her bow to starboard?

A. Yes sir.

Q. So that if the Tillicum was backing, then the Tillicum's bow would swing to starboard, would it not?

A. Yes sir, he would swing in shore, if he was backing she should have been on our port side.

Q. That depends altogether on where your vessel was. I did not ask you about that because no one can tell how the two vessels will go, but you can tell which way the Tillicum pull. Her stern will go to port and her bow will go to starboard?

A. Yes sir.

Q. How long did you stay there before you went ahead, before you went on?

A. I did not pay much attention after that; we laid there and drifted and I asked the captain of the scow if he needed assistance and he said he was all right, and we started up. That might have been two or three minutes or might have been four minutes. I could not tell exactly.

Q. Did he ask you if you were all right?

A. I cannot really remember; I think he did.

Q. Did you stop and examine her bow to see whether you were all right?

A. Yes, we looked at the bow to see if we were all right.

Q. Where was the Tillicum lying while you were talking to him?

A. He was on our starboard side.

Q. Forward of you?

A. No, he was right abreast on the starboard side.

Q. Was he back of your bow, abreast amidships or abreast of your bow?

A. He was right abreast us. Abreast means amidships, does it not?

Q. Was the tow between you and the Tillicum?

A. No sir.

Q. Where was the tow?

A. The tow was on the other side of her; her tow was on the port side.

Q. How far was he away from you when you were talking to him?

A. Oh, about two or three hundred feet.

Q. Then you could hardly see him?

A. Just could see him.

Q. Just see the lights?

A. We saw the lights of the boat, yes. He might not have been quite so far as I say, because foggy weather is deceiving and looks further than it is.

Q. You said captain that when you backed the Rosalie her stern swings to port and her bow to starboard?

A. Yes sir, after she gets stopped headway, not right off. When she is going ahead she does not turn at all until she stops headway.

Q. As soon as she stops headway she begins as she moves back in the water to swing to port with her stern and her bow to starboard?

A. Yes sir.

MR. HUGHES: I offer this log book in evidence as part of the cross examination of the witness.

Log book marked claimant's exhibit "1," filed and returned herewith.

(Testimony of witness closed.)

W. L. KINSEY, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. Robinson). Mr. Kinsey, were you the engineer

on board the *Rosalie* on the morning of the 8th of April, 1911, when she was in collision with a scow and tug?

A. Yes sir.

Q. Were you on duty at the time of the collision?

A. Yes sir.

Q. Were you chief engineer of that boat?

A. No sir, assistant.

Q. What license had you at the time?

A. Chief of inland.

Q. What experience had you had on that particular boat prior to that time?

A. About 16 to 18 months.

Q. Now, could you tell, Mr. Kinsey, about when you passed West Point that night?

A. No sir, I was down in the lower engine room, and I could not hear the whistle.

Q. You knew when you came into collision that night, didn't you?

A. Yes, I felt them stop.

Q. How had you been running your engines immediately previous to coming into collision?

A. Why, we had been running at reduced speed, that is when we ran into the fog, it was customary to whistle down, telephone down and tell me that we were in a fog, and we usually eased up a little, reduced the steam. I should say reduced it down a knot or so, but I could not say the hour.

Q. About what time was that that you got that order?

A. It was about 4:45 or 4:30. I could not tell just the time. I had my watch in my clothes and I was away down in the lower engine room and my watch was in the upper engine room. I was busy down below, and had my watch hanging in the upper engine room, and the clock was also there.

Q. Well then, what has been your experience with the boat *Rosalie*, what speed would she be making after you got that order at 4:45 or whenever it was?

A. She would be making between seven and eight knots.

Q. What was the next order you got from the bridge?

A. I got a slow down and stop bell.

Q. Were they close together?

A. Yes sir.

Q. What next?

A. Then sometime after that I got a bell to go ahead.

Q. How long did you go ahead?

A. Oh, just what we call a kick ahead. It would only be

two or three revolutions, you know. Just a few revolutions, and the other bells came immediately after.

Q. What next, Mr. Kinsey?

A. Well, we backed something over a minute when I felt the jar.

Q. Something over a minute?

A. Yes, I could not say just how long. I know it was considerably longer than the usual backing going into a landing.

Q. Mr. Kinsey, you say you had had 18 months experience on the Rosalie at that time?

A. Yes sir.

Q. As engineer.

A. About 18 months.

Q. Suppose the Rosalie to be going at a speed of between seven and eight knots an hour, and then have her engines stopped approximately a minute, and then just kicked ahead, and then have the engines run full speed astern for over a minute, what would you say, from your experience in handling the engines on the Rosalie, would be the effect on her headway?

A. She would be going astern, sir.

Q. Are you in the employ of the Inland Navigation Company or in the marine business at all now?

A. No sir.

*Cross Examination:*

Q. (Mr. Hughes). What are you doing now?

A. In the chicken business.

Q. How long since you quit the Inland Navigation Company?

A. Last May.

Q. Been in the chicken business ever since?

A. No sir, I have been in different businesses.

Q. Have you any engagement to go into the service of the Inland Navigation Company?

A. No sir.

Q. No application in with them for employment?

A. No sir.

Q. Did you go voluntarily or were you discharged?

A. I quit voluntarily.

Q. Did you keep a log in the engine room?

A. Just a log for comparison, that is all, nothing definite.

Q. Did not you keep a regular log in the engine room?

A. Yes sir.

Q. Have you got that log here?

A. No sir. As I say it was merely a desultory log for the comparison of time. Did not keep a log like a steamship.



Q. Did not you keep a log to show every unusual order that is given to you from the pilot house?

A. No sir, we put down the time at the end of the trip, it shows the length of time.

Q. Did you make a note of any of these orders that you got in the engine room?

A. When I got to Seattle I put down the time, that is the time that we stopped and the time of the collision.

Q. How long after you were in Seattle did you put down that time?

A. Why, as soon as we were tied up in Seattle. I could not very well leave the lower engine room to go up there.

Q. Did anybody give you the time, did anybody confer with you in making the entries?

A. No sir. I looked up through the grating and took a glance at the time, that is all, I could not tell the exact time at that distance, it was approximate.

Q. Did anybody help you when you made your entries in your log after you got to Seattle?

A. No sir.

Q. Did you make the entries in that log that morning immediately after you got into Seattle?

A. Yes sir.

Q. Were you alone in the engine room or did you have helpers?

A. Oh yes, had a fireman there.

Q. Have any assistant engineer there?

A. No sir.

Q. No other engineer beside yourself?

A. No sir.

Q. Nobody beside the fireman?

A. No sir.

Q. How many firemen did you have?

A. One fireman on watch.

Q. How can you remember now what signals you got and the length of time between them, if you made no record of it at the time and been out of that employ since then and had nothing to refresh your memory?

A. I made a record of it at the time.

Q. You say you made a record after you got to Seattle?

A. Yes sir.

Q. Did you make a record that morning after you got to Seattle?

A. Why certainly.

Q. Was there anybody present when you made that record in your log book?



A. Why, certainly. The fireman might have been there.

Q. Was there anybody present when you made that record beside that, was the captain present when you made it?

A. No sir.

Q. Or any one connected with the Inland Navigation Company?

A. No sir, not that I know of.

Q. Did you refresh your memory by looking at your log since that time?

A. No sir, it was not necessary. I might have lost that date it has been so long ago.

Q. I simply asked if you had looked at your log before coming here to testify, since you made the entry in the book?

A. No sir.

Q. You mean to say you never looked at your log since you made that entry in it?

A. Yes sir.

Q. Before coming here to testify?

A. Yes sir.

Q. Have you talked with Captain Hanson about the time, before coming here to testify?

A. I have not seen Captain Hanson.

Q. Have you talked with any one to refresh your memory before coming to testify?

A. No sir.

MR. HUGHES: I ask counsel to produce the log.

MR. ROBINSON: I will produce it if we can find it. I have not got it here. I never looked for it.

Q. How many engine rooms have you there, two?

A. Yes sir, the upper and lower with a grating between.

Q. What is the difference between the upper and lower, explain that?

A. The upper engine room is on a level with the main deck. The cylinder is about three feet above that deck, and the lower engine room is below that.

Q. How much below.

A. About seven or eight feet.

Q. What were you down in the lower engine room for?

A. Answering the signals.

Q. Cannot you answer them from the upper engine room?

A. No sir.

Q. Have to be in the lower engine room to answer the signals?

A. Yes sir.

Q. Why did not you have your logbook there where you had to work?

A. It was not up to me, it was that way when I went there.

Q. You never took your logbook where you did the work?

A. No sir.

Q. What work did you do in the upper engine room?

A. Oh, just the ordinary packing, ordinary engineer's duty up there.

Q. Your ordinary duties must have been performed in the lower engine room, you cannot operate the engine room but from the lower?

A. There is an electric engine on that deck.

Q. You did not run the ship by the electric engine on that deck?

A. No, but you run the lights by the electric engine on that deck.

Q. You did not have to pay any attention to the dynamo, the electrical engine, when you set the lights going you did not have to keep watching them?

A. You have to go up there every hour or half hour and oil it.

Q. You mean to say that the logbook was kept up in the engine room where the dynamo and electric engine is?

A. Yes.

Q. And not kept down in the lower room where your duties are as engineer in the navigation of the ship?

A. Yes sir.

Q. All your duties in navigating that ship are in the lower engine room, are they not?

A. Yes sir.

Q. And were you in the lower engine room all that time?

A. Yes sir.

Q. You have no knowledge when you passed West Point?

A. No sir.

Q. Did you have any information from the bridge that you had passed West Point?

A. No sir, I was not paying attention to the light.

Q. Did you have any clock in the lower engine room?

A. No sir.

Q. How did you get the time then when you were in the lower engine room if you had no clock there?

A. I looked up through the grating.

Q. You mean to say you looked up at the clock through the grating. Could you see the clock and see the time?

A. Yes, approximately, near enough for all purposes.

Q. It could only be a guess then. You did not see the watch and take note of the time?

A. I could see the hands of the clock, yes.

Q. You could see the hands on the clock.

A. Yes, looking at it at that distance.

Q. When you got the first signal where was the hands of the clock?

A. About 5:10, between 5:10 and 5:15.

Q. Why do you say about if you could see the time by looking up through the grating?

A. Well, I say about, because if I was in the upper engine room it would not look the same as from the lower.

Q. You don't know exactly what time it was?

A. No sir.

Q. You do not know exactly the time between the signals?

A. Only from the length of time.

Q. It is only a matter of guessing and estimating the time that you are giving here?

A. Approximately, as near as I can tell from the clock at that distance.

Q. Now are you sure you received any signal to change your speed before reaching West Point?

A. Yes sir.

Q. What makes you sure of that, you made no record of it in the logbook?

A. No sir, of course we always get that signal when he starts to blow the fog signal.

Q. Down below there you could not hear the whistles?

A. Yes, I can hear our whistles.

Q. Did you hear your whistle blow that night?

A. Yes sir.

Q. How many times did it blow?

A. Blowed as they usually blow in a fog, every half minute or so.

Q. You heard the signal, what was the signal you heard from the pilot house, what was your first signal?

A. Do you refer to the whistle or to the bell?

Q. After you passed West Point light, what signal did you get in your engine room from the pilot house?

A. I got bells to stop.

Q. What kind of a bell, one bell?

A. Two bells.

Q. Two bells?

A. Yes sir.

Q. You are sure about that?

A. Yes sir.

Q. What did you do?

A. Stopped the engine.

Q. What revolutions did you have prior to that time?

A. About 110 or 115.

Q. How many had you had from Apple Tree Cove on until you got near West Point?

A. Oh, we ran about 108 or 105.

Q. Then you had not changed it up to the time you got these two bells, you were running 108 or 110 revolutions of the engine, were you?

A. Yes sir.

Q. What did you do when you got those two bells?

A. Shut the steam off and stopped the engine.

Q. Didn't you first slow down?

A. You got to slow down to stop?

Q. Did you shut off the steam entirely?

A. Yes sir.

Q. At once. You got no intermediate signal to slow down and stop?

A. Two signals to slow down and stop.

Q. How long was it between these two signals?

A. Practically together.

Q. How long did you have the steam off?

A. Something about a minute.

Q. About a minute.

A. Yes sir.

Q. Then you got the signal to go ahead?

A. Yes sir.

Q. How can you say that you recollect how long you were going ahead?

A. Why a man in that business has those things in his head. She just got a kick ahead, that is the way you speak of it, if you are going ahead a certain length of time, it is all right, but if you say a kick ahead, that means just practically started ahead, then you reverse.

Q. You say a man has that in his head. How many times do you get signals like that that night? Can you remember all of them?

A. No sir, I do not have to.

Q. Can you remember anything that occurred before that or after that?

A. Oh yes.

Q. Without any record of it at all and you remember it now?

A. Yes sir.

Q. Then when you get the signal to go ahead and when you get the signal to stop, you can always carry that in your head? No matter how long afterwards?

A. Oh anything necessary.

Q. You never make a record of it in your log book at all?

A. If it is important we do, yes sir.

Q. You did not consider this important?

A. I did not consider that one bell important, no sir.

Q. Well, when you got the bell to go ahead, you almost immediately got a bell to stop?

A. Yes sir.

Q. And that was followed by what?

A. Two bells.

Q. What does that mean?

A. Go astern.

Q. I thought two bells meant to stop?

A. When you are going full speed ahead, yes.

Q. After you got these two bells you got two more bells, did you?

A. You are mixed up on the bells, I am not.

Q. Let us get it clear. You had stopped your engines?

A. Yes sir.

Q. Then you got a signal to go ahead?

A. Yes sir.

Q. And you started ahead.

A. Yes sir.

Q. Now you got what bells after that?

A. A bell to stop and two bells to go astern.

Q. A bell to stop?

A. Yes sir.

Q. And then how soon after that did you get the two bells to go astern?

A. Immediately, the three bells came together.

Q. Now then when that occurred, you knew there was something unusual happening, didn't you?

A. Yes sir.

Q. You made no record of it?

A. I could not run upstairs and make a record of it.

Q. You made no note of it of any kind at the time, did you?

A. No sir. I could not write it on the polished iron; I had to go upstairs.

Q. They provided no book for that purpose?

A. No sir.

Q. How can you tell how long it was that you were backing?

A. Well, the backing, you are backing every day, and you know how long it takes you, how long it takes as a general thing to back for a landing.



Q. Now Mr. Kinsey, during this time after you had stopped your engines first—

A. Yes sir.

Q. What whistles did you hear?

A. I did not keep a record of the whistles.

Q. Have you any record in your remarkable memory of the whistles?

A. Fog whistles blowing regularly.

Q. Did you hear any whistles, can you testify that you heard any whistles after the first bells to stop the engine?

A. No sir, I would not testify to that; I had my own business to attend to.

Q. Did you go outside afterwards, after the vessels stopped, or did you stay in the engine room?

A. I stayed in the lower engine room.

Q. So that you did not see the object that you came in collision with?

A. No sir.

Q. Know nothing about that except as reported by others.

A. No sir.

Q. You did not leave the engine room at any time before or immediately after the collision?

A. No sir.

Q. How long, in all, were you backing your ship. How long were you going full speed astern?

A. It was a minute or two minutes.

Q. Altogether, before you got the signal to stop?

A. Yes sir.

Q. You got the signal to stop and you obeyed it, did you?

A. Yes sir.

Q. How long after you got the signal to stop was it before you got another signal?

A. Oh, it was between a minute and two minutes, about.

Q. What signal was that?

A. That was the signal to go ahead, one bell to go ahead.

Q. Slow?

A. Yes sir.

Q. How long did you go under that slow signal?

A. That would be about forty seconds.

Q. Then what?

A. Then full speed ahead.

Q. Then full speed ahead.

A. The ordinary speed ahead.

Q. Then you continued that on into Seattle?

A. Yes sir.

Q. Without any other change?

A. Yes sir.

(Testimony of witness closed).

MR. HUGHES: After the engineer's log is produced I may want to recall this witness for further cross examination.

HARRY GATES, a witness called on behalf of the Libelant, being duly sworn, testified as follows:

Q. (Mr. Robinson). You were on board the *Rosalie* on the night of April 8th, 1911, when she came in collision with the tug and scow?

A. Yes sir.

Q. Were you on duty at the time?

A. Yes sir.

Q. Where were you, what were you doing?

A. I was at the wheel, steering.

Q. Who else was in the pilothouse, if anybody?

A. Captain Hanson.

Q. Was there anybody on the bow?

A. Yes sir.

Q. Who?

A. Loui was on the bow, Bougojard.

Q. Did you see West Point when you passed it that morning?

A. No sir, I did not see West Point when we passed it.

Q. Do you know about when you passed it?

A. I do not know the exact time. I know when we changed the course, we were at West Point then.

Q. Were you in a position to know what the signals were which were sent the engine room?

A. Yes sir.

Q. After you had passed West Point for sometime, did you have a report of a whistle from the lookout?

A. Yes sir.

Q. Did you hear that whistle yourself?

A. Yes sir.

Q. Do you know what was done by the captain at that time?

A. Yes, he stopped her.

Q. What did you do next, what did you recognize and see next, tell us all that happened.

A. He was drifting along; he was whistling all the time and could not get no answer and so he started ahead.

Q. How long did you go ahead?

A. Just went ahead, I should think about enough to get

started; then we got another whistle and he started to back.

Q. Then what happened?

A. Then we seen the redlight on the Tillicum.

Q. On the Tillicum?

A. Not on the Tillicum but on the scow. It looked to be a scow and the next thing I seen was the end of an oil tank.

Q. Oil tank?

A. Yes sir.

Q. And then what happened?

A. Then I seen the Tillicum, I seen the lights of the Tillicum.

Q. Then what happened after that?

A. Then the next I saw was—we backed—and the next thing I saw was the oil tank and it looked to me as though it was half overboard, it looked as though it was kind of over the front of the scow.

Q. Did you finally come in collision?

A. Come into collision?

Q. Yes.

A. Yes sir.

Q. About where did you hit her, or did she hit you, as the case may be?

A. Where they struck together I should judge was a little bit on this side of the redlight.

Q. (Mr. Hughes). By this side you mean toward the Tillicum?

A. Between the red light on the scow and the Tillicum.

Q. That would be on the starboard side of the scow?

A. Yes sir.

Q. (Mr. Robinson). How long had you been backing, in your opinion, before this collision occurred?

A. Must have been backing a minute; backed longer than we back at a landing.

Q. Do you know whether or not you had sternway or were stopped or had headway, or what your boat was doing at the time they came together?

A. I know we must have had sternway. The wheel had stopped kicking, and I had stood there and there was no strain on the wheel, so we must have had sternway.

Q. Any other reason for thinking so?

A. No sir.

*Cross Examination:*

Q. (Mr. Hughes). How long have you been a quartermaster—are you a quartermaster?

A. No sir, supposed to be lookout man.

- Q. Did not they have a quartermaster on that boat?
- A. No sir, not what they called a quartermaster.
- Q. How long had you been performing the duties of a quartermaster or standing at the wheel?
- A. About four years, off and on, altogether.
- Q. When did you take the wheel that night?
- A. I took it about five or ten minutes after four.
- Q. Had you had it previous to that time?
- A. Yes, I had it until 2 o'clock.
- Q. Where were you when you took it, do you remember where the boat was?
- A. Yes sir, a little past Apple Tree Point.
- Q. This side of Apple Tree Point.
- A. Yes sir.
- Q. What officer was in the wheelhouse?
- A. Captain Hanson was in the pilothouse.
- Q. He was the first mate of the boat, was he?
- A. Yes sir.
- Q. Had he given you any orders about the helm, what you should do with the wheel, prior to reaching West Point?
- A. No sir.
- Q. You did not change the course at all?
- A. Not from Apple Tree to West Point.
- Q. From the time you took the wheel at Apple Tree to West Point you did not change the course?
- A. No sir.
- Q. But you changed after you passed West Point?
- A. We changed it at West Point.
- Q. Did you change it at any time before the collision, change your wheel?
- A. At West Point I changed the course.
- Q. What change did you make at West Point?
- A. Changed the wheel over to starboard; I was steering south east half east.
- Q. What change did you make?
- A. About a point and a half, something like that.
- Q. What course did you steer after passing West Point?
- A. Southeast half east.
- Q. Captain Hanson gave you that order?
- A. Yes sir.
- Q. You say you did not see West Point light yourself?
- A. No sir.
- Q. Did he call your attention to the fact that you were passing West Point?
- A. No sir.
- Q. All you know was that he gave you the order to change.

A. Change the course.

Q. That is all the order he gave you?

A. Told me to starboard.

Q. Did he say how much?

A. No sir, he did not say how much. He put his time down and then told me south east half east.

Q. Now then after you had been running some little time the lookout called out what?

A. Whistle on the port bow.

Q. Did you hear it yourself?

A. Yes sir.

Q. Did it sound the same to you, as the lookout reported?

A. It seemed to me to be on the starboard bow from where

I stood.

Q. You think the lookout was wrong?

A. I think the lookout was wrong.

Q. Did the captain, or mate, say anything?

A. He just reported it, that was all.

Q. Reported what?

A. He reported what the lookout reported to him.

Q. He reported the words "Whistle on the port bow"?

A. Yes sir.

Q. Did you mention to him that it sounded to you as if it was on the starboard bow?

A. No sir.

Q. You did not?

A. No sir.

Q. Did he give you any orders or instructions?

A. No sir.

Q. What did he say or do after reporting or repeating the call of the lookout?

A. Well, he stopped.

Q. What did he do?

A. He pulled the bell pull.

Q. Could you hear the jingle of the bell?

A. Yes sir, I could hear it.

Q. Do you know how many times it jingled?

A. Jingled twice.

Q. Twice in rapid succession?

A. Yes, rapid succession, just about that much between.

Q. Did he do anything else?

A. Then he kept blowing the whistle all the time.

Q. Now do you remember whether he blew his whistle after he gave the jingle bells, the two jingle bells?

A. He gave two jingle bells.

Q. After he rang the engineer to stop?



A. Yes, he blew the whistle then.

Q. Are you sure about that?

A. Yes sir.

Q. What whistle did he blow?

A. One whistle.

Q. One whistle?

A. Yes sir.

Q. How long was it before you heard any other whistle ahead of you?

A. Ahead of us? I did not hear any other whistle until after we had started to go ahead.

Q. Well, did the lookout report that?

A. Yes sir.

Q. What report did he make?

A. Whistle ahead.

Q. Did not he report a whistle on the port bow? You heard the testimony here, did not he report some whistle on the port bow?

A. I think he said a whistle ahead.

Q. What did the captain repeat that time?

A. He repeated whatever the lookout said.

Q. What was it he repeated?

A. I don't remember, I know he repeated it because he always does repeat it, whatever he said.

Q. Could you see any light?

A. At that time?

Q. Yes.

A. No sir.

Q. Did you hear that whistle?

A. Yes sir.

Q. Where did it appear to you to be?

A. Appeared to me to be on the starboard bow.

Q. How much on the starboard bow?

A. I should judge about a quarter of a point on the starboard bow.

Q. It appeared to you to be as much as a quarter of a point on the starboard bow?

A. Yes sir.

Q. Did you have any idea how far off that was?

A. No sir.

Q. Did you hear any echo from the shore?

A. No sir. Did not.

Q. What was the next thing that occurred now in the way of whistles or bells, after this second report of the lookout?

A. After the second report of the lookout?

Q. What was the next thing that occurred?

A. Why, he stopped the engines and backed them.

Q. I ask you what was the next thing that occurred, the captain did what?

A. He pulled the bell pull.

Q. How many times?

A. Three times.

Q. How soon after that second report of the lookout did he give these three bell pulls?

A. Just as soon as he could step back and pull them.

Q. Did he give you any order?

A. No sir.

Q. What was the next thing that occurred after that?

A. The next thing that occurred after that?

Q. Yes sir.

A. The next thing that occurred we heard them blow a towing whistle.

Q. You heard them blow a long and two short whistles?

A. Yes sir.

Q. How long was it after these bell cords were pulled the three times?

A. Might have been half a minute.

Q. Well, what was the next thing that occurred or that you heard or saw after the tug boat gave the three whistles?

A. The next thing I heard or saw was the redlight on the scow.

Q. Could you see the scow or only the redlight when you first saw it?

A. I saw the red light and the oil tank.

Q. You could see both of them at the same time.

A. At the same time.

Q. About how far distant did that appear to be?

A. Right in under the bow.

Q. Well, as much as seventy-five or a hundred feet away?

A. No, it did not look that far to me.

Q. Did you say anything?

A. No sir.

Q. Did the captain say or do anything?

A. Why, he just reached for his whistle cord.

Q. Before he whistled the tugboat gave another whistle?

A. The Tillicum gave a whistle, a danger signal.

Q. Whistled four blasts?

A. Whistled four blasts.

Q. And then your captain whistled four blasts, did he?

A. Yes, they were blowing the danger signal about the

same time. We were may be one whistle slower than they were.

Q. Now by that time could you see any more of the barge or could you see the lights of the Tillicum?

A. Yes sir, I could see the lights of the Tillicum.

Q. About the time she was blowing her danger signal?

A. Yes sir.

Q. You saw her lights?

A. Yes sir.

Q. How soon after that did the two ships come together, almost immediately?

A. Almost immediately.

Q. Could you see where your bow struck the tow?

A. I could not see exactly from where I was where she struck the tow, but I just guessed she struck half way, just a little bit to one side of the red light.

Q. That is a little toward the Tillicum?

A. Yes sir.

Q. That would be toward the starboard side of the tow?

A. Yes sir.

Q. And did it appear to swing the tow and the Tillicum around when you came together?

A. No sir. We just came together and were right off.

Q. You hit a sort of glancing blow?

A. Yes, just seemed to touch and then got off.

Q. Well, did they pull apart then, the two ships.

A. Pull apart?

Q. Separate?

A. Yes sir, separate.

Q. How did you separate from each other?

A. Why, we just went clear, that is all.

Q. Which way did your vessel go from the tug and the tow?

A. Our vessel came this way (showing).

Q. That does not mean anything by pointing. Which way?

A. Back towards West Point.

Q. Which way was the tow?

A. There was a thick fog and you could not tell about directions there.

Q. I did not ask that. Just confine yourself to the two objects. You can give us some idea. As you separated from the tow and the tug which way was the tow and the tug from your bow?

A. As they separated they were head and head.

Q. And as you kept getting further apart, which side of you did they appear to be on?

A. On the starboard side.

Q. As you kept separating the tug boat would then come between you and the tow, would it, the tow would be a little further off from you?

A. Yes sir.

Q. That is you were getting off further on the starboard side of the tug and the tug was on the starboard side of you?

A. Yes sir.

Q. And ahead of you at the same time?

A. No sir, she was going off on the side of us. I don't know how to explain it.

Q. Kept off to the starboard side?

A. Kept off to the starboard side, when we stopped, after backing she was right abreast of us.

Q. How far away?

A. I could not judge the distance. Just could make her out in the fog.

Q. Just make her out?

A. Yes.

Q. What else could you see?

A. Could see her red light.

Q. Well, did she have more than one red light?

A. Saw the red light and saw the green light, that is all I could see.

Q. Did she have more than one red light?

A. I did not notice the riding light.

Q. You say you saw her green light?

A. Yes sir.

Q. But you could not make out anything more than her lights?

A. No.

Q. That is there was so much fog there, it was so dark and thick that you could simply make out the lights through the fog, is that right?

A. Yes sir.

*Redirect Examination:*

Q. (Mr. Robinson). Mr. Gates, are you in the employ of the Inland Navigation company?

A. No sir.

Q. Or of any boat company?

A. No sir.

Q. What are you doing?

A. Working in a mill in West Seattle.

Q. Whose mill?

A. Schweiger and Nettleton's.

Q. How long have you been out of the employ of the Inland Navigation company?

A. Since the 17th of February.

Q. (Mr. Hughes). What are you doing in Schweiger & Nettleton's mill?

A. Taking lumber off the chain.

(Testimony of witness closed).

H. M. HENDRICKSON, a witness called on behalf of the libellant, being duly sworn, testified as follows:

Q. (Mr. Robinson). Were you aboard the *Rosalie* the night of the accident happened that we have been talking about?

A. Yes sir.

Q. What capacity?

A. Fireman.

Q. Is the *Rosalie* an oil burner?

A. Yes sir.

Q. Now did you have to make changes in feeding the fires when the engine is stopped or backing or that sort of thing?

A. Yes sir.

Q. Do you remember of this collision happening?

A. I do not remember just the time.

Q. Do you recall whether or not the engines were stopped sometime previously to this collision?

A. Yes sir.

Q. How do you know that?

A. I could see the engines, I am right forward of the engines.

Q. You could see them?

A. Yes sir.

Q. Can you tell if the engine is going ahead or going slow or going astern?

A. Yes sir.

Q. Did you know that there had been a collision?

A. No.

Q. After it happened, did you feel it down there?

A. Yes, I could feel it there.

Q. How had the engines been running immediately previous, I mean just before the shock.

A. She was not running full speed that we had been running before; we had slowed down a little after we left Apple Tree.

Q. You do not understand what I mean, I guess. Just before you felt the shock, how were the engines running?



A. Oh they were backing full speed astern.

Q. How do you know?

A. I seen them. I heard the bells given and I put my both fires on then.

Q. Previous to then what had the engines been doing?

A. They were stopped and backed and come ahead and then backed.

Q. Does that make a change in your fires?

A. Yes.

Q. Have you any recollection of about how long that backing took place that you speak of?

A. I judge about a minute and a half.

Q. How long do you think she had been stopped, the ship had been stopped before you got the bell to go ahead?

A. I could not tell.

*Cross Examination:*

Q. (Mr. Hughes). What makes you think it was a minute and a half?

A. That is my own judgment.

Q. After this lapse of time you could not form any judgment whether it was 30 seconds or 90 seconds, could you you?

A. I have that much remembrance anyhow.

Q. You had nothing to do with the operation of the engines at all?

A. I had to watch the boilers and keep up the steam.

Q. You kept the steam up all the time?

A. Yes sir.

Q. You had to keep up the steam just the same?

A. Yes sir.

(Testimony of witness closed).

CAPT. SAMUEL BARLOW, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. Robinson). You were master of the Rosalie at the time this collision happened that we have been talking about?

A. Yes sir.

Q. You were not on duty at the time, were you?

A. No sir.

Q. When did you go on deck?

A. Shortly after the accident occurred.

Q. Could you see the scow and the Tillicum at that time?

A. No.

Q. You could not see her?

A. No.

Q. And did you hear any of these whistles or anything?

A. No, I did not hear any of the whistles, I was asleep.

Q. Captain, how long had you been master in charge of the navigation of the *Rosalie*, one way or another, previous to this accident, how many years?

A. About six.

Q. You were very familiar with her operation then?

A. Yes sir.

Q. Suppose that the *Rosalie* was making a speed of between seven and eight knots an hour, then stop her engines for nearly a minute, then a kick ahead, then backing for a minute and a half or more, what would you say as to whether she would have headway, sternway or be stopped in the water?

A. She would have sternway.

Q. Captain, did you report this accident to the local Inspectors?

A. Yes sir.

Q. I ask you to examine that paper and ask you if that is a copy of the notice?

A. Yes, I believe that is it.

MR. ROBINSON: I offer this paper in evidence, merely to show that the accident was reported.

MR. HUGHES: I do not think it is competent or material. It is a mere self-serving declaration.

Paper marked libelants exhibit "A", filed and returned herewith.

*Cross Examination:*

Q. (Mr. Hughes). How long was it after the collision before you got on deck?

A. I don't know just how long it was, I could not say.

Q. Were you called?

A. Yes sir.

Q. Who called you?

A. Mr. Hanson.

Q. And you got up and dressed?

A. No, I came on deck first without dressing.

Q. Well, the tug and the tow were not in sight when you came on deck?

A. Well, they might have been in sight if I had examined but they were on the opposite side to my door when I came out of the room.

Q. Which side is your door on?

A. My door is on the port side.

Q. How long did you stay on deck?

A. Well, I just stood on deck a few minutes there talking to Hanson, asked if they were all right and if our boat was all right.

Q. Did you go around on the starboard of your boat?

A. No, I went out as far as the front of the pilothouse.

Q. Out in front of the pilothouse, did you?

A. Yes sir.

Q. On the bow of your boat?

A. Yes sir.

Q. And you did not see the lights of the Tillicum or the scow?

A. No sir.

Q. Did you examine your own bow to see whether you had any harm done?

A. No, but he sent somebody, I don't know who he sent.

Q. Did you stay on deck until your ship started ahead toward Seattle?

A. No, she was stopped then.

Q. You went back to your room?

A. I went back to my room.

Q. Before he started on?

A. Yes, then he started.

Q. Did you hear any conversation between Captain Hanson and the master of the tug?

A. Yes, I heard the master of the tug say he was all right.

Q. You could not see his boat when he was talking?

A. No, I did not see him because I had not got out of my room yet.

Q. Do you know how the tide was at that time?

A. No, I do not remember.

Q. Do not know whether it was ebbing or flooding?

A. No.

Q. If you had a flood tide what effect would that have on your speed?

A. It would not have any effect on the speed at all.

Q. Would it have any effect on the distance your boat would continue to go through the water after you stopped?

A. Well, no. It would have a difference over the ground but it would not have any difference in the water.

Q. Would it make any difference whether there was a flood or ebb tide as to whether your vessel would overcome her headway and get sternway quicker or not?

A. No, it would not make any difference.

Q. If you had a flood tide you would get sternway just as quick under the circumstances by stopping and backing?

A. In the water we would, we might not in an object like

that that was stationary, but in the water we would overcome that just about the same.

Q. The run of the tide would carry you right on even if your wheels were taking hold of the water?

A. We would be going the same in the water.

Q. Nevertheless if your wheels were taking hold and going astern, your vessel might still be carried forward with the tide, might it not?

A. It would be carried forward in the tide, but for any objects away from the bottom there would be no difference.

Q. How long would your vessel continue in motion, if you stopped her going at a speed of seven or eight knots an hour?

A. Continue in motion?

Q. Yes, how long would she have headway?

A. After we stopped?

Q. Yes, stop but do not change the helm at all?

A. There are different ways of stopping, do you mean stop the boat or stop the engine?

Q. Suppose you stop the engine and do not change the helm how long will you continue with headway, if your vessel has had a speed of seven or eight knots an hour?

A. Will depend on whether there is a wind or anything.

Q. In a quiet time when there is fog.

A. Well, sometimes there is wind when there is fog.

Q. Not usually is there? Not that night was there?

A. There was a little air, it was not much.

Q. In that kind of weather?

A. In that kind of weather she would she would carry her headway for about seven minutes.

Q. When you are making a landing, how long do you reverse your engines before you bring your ship up to the landing?

A. It all depends on the weather. If we have a headwind we do not reverse them quick; if we have a fair wind we reverse them quicker. It all depends whatever the weather is.

Q. About how long, in ordinary fair weather, calm weather?

A. In calm weather we figure on making a landing, and I make a landing right along in four minutes from the time I slow down until I stop and take the slip.

Q. Do you have to back or just slow down?

A. We back. We have to have headway enough to go to the dock to steer her.

Q. If you were going full speed ahead and you were to



stop and give a signal full speed astern, how long would it take you before you were making sternway?

A. From full speed ahead?

Q. Yes.

A. A little less than two minutes.

Q. Can you stop her and overcome her momentum and actually be making sternway in two minutes?

A. Yes sir, in less than two minutes.

Q. Do you ever go into the docks in that way?

A. Into the docks?

Q. Into landings?

A. Well, we go in to the docks lots of times where there is a tide running and work in at considerable headway and when the wind is blowing.

Q. How long will you reverse your engines under these circumstances?

A. Well, we would reverse in about—

Q. How long would you keep your engines reversed full speed?

A. Well from what? Slow down or from stop?

Q. Well, we have had some witnesses who undertook to fix the time by your customary habit in entering a dock. How long do you run your engines full speed astern to stop your boat?

A. Where from, from full speed or slow down?

Q. From full speed?

A. From full speed?

Q. How long do you back her at the docks, when you are approaching the docks, how long, commonly?

A. Commonly back her about three-quarters of a minute or sometimes a minute.

Q. From half a minute to a minute?

A. Owing to conditions. There is always different conditions about landing a boat.

Q. It is very unusual to back her a half a minute, is it not?

A. Depends on how much the speed is.

Q. In approaching a dock, coming up to your docks and making your landings, it is a very unusual thing for to have your engines reversed for half a minute?

A. No, sometimes we only give her a few turns.

Q. Commonly you mean you reverse her but a few seconds, is not that true?

A. A few seconds? We reverse her more than that.

Q. Ordinarily less than half a minute, a quarter of a minute?



A. It is always more than half a minute. When we make an ordinary landing it is over half a minute.

(Testimony of witness closed).

Hearing adjourned.

SEATTLE, WASHINGTON, *June 6, 1913.*

Present: Mr. Robinson, for the libelant. Mr. Hughes, for the claimant and cross libelant.

JOSHUA GREEN, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. Robinson). You are the President of the Inland Navigation company, the libelant in this suit?

A. Yes.

Q. And were, in April, 1911, when a collision occurred between the Rosalie and an unnamed scow in tow of the Tillicum?

A. Yes sir.

Q. Did you see the Rosalie on the morning after that collision or shortly after?

A. Yes sir.

Q. Tell, in a general way what the damage appeared to you to be?

A. The stem was broken and the ends of the planking were mashed and bruised up, the planking of the ship. The stem was knocked off practically and the wood ends, I think that is the technical term, the wood ends, that is the end of the planking that comes forward right behind the stem.

Q. (Mr. Hughes). Do you mean the deck plank?

A. No, the whole planking of the steamer.

Q. (Mr. Robinson). Did you consider this injury serious enough to call for a survey?

A. Yes sir.

Q. Did you have a survey made?

A. Yes.

Q. Who did you call in for that purpose?

A. I called in Captain Fowler and Captain Walker.

Q. Frank Walker?

A. Yes sir.

(MR. ROBINSON: I will withdraw the witness temporarily and recall him after I have presented other testimony.)

CAPT. JAMES FOWLER, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. Robinson). Your name is Capt. James Fowler?

A. James Fowler.

Q. What is your occupation?

A. Surveyor to Lloyd's Register, and Lloyd's agent.

Q. And you have been in that business for sometime?

A. For over thirteen years.

Q. Did you make a survey of the Rosalie about April 9th, 1911, after she had been in collision with a scow?

A. I did.

Q. Will you tell us, captain, what you found the damage was at that time?

A. She was lying at the dock and I could see from the water line down she was severely injured about the stem. She was then placed in the dry dock, and we found the stem iron broken, and the stem split and bruised from the guard down to the forefoot. A number of the sheets of yellow metal in that vicinity damaged. When the stem was split out we found the apron inside also split and broken. On the starboard side the planking was split and bruised and had to be removed to renew the apron.

Q. Was any of the metal lost, captain?

A. Some of the sheets, of course they were useless, torn and useless and they had to be replaced with new; some of it went back on again.

Q. Did you make recommendation as to the repairs to be made?

A. Yes sir.

Q. Substantially as you have detailed. Did you see the ship again after the repairs had been made.

A. Yes.

Q. Were the repairs made that you had recommended, and as you had recommended them?

A. Exactly, in every detail.

*Cross Examination:*

Q. (Mr. Hughes). Were any further repairs made?

A. No further repairs made to that part of the vessel.

Q. To the stem, no further repairs were made than you recommended?

A. No.

Q. Were there any other repairs made to the vessel while in the dock that you know of?

A. No, I do not know.

Q. Have you ever surveyed this vessel before?

A. Yes sir.

Q. Is she surveyed and classified by Lloyd's?

A. I beg pardon?

Q. Does she have a Lloyd's survey?

A. No she is underwritten by Lloyd's underwriters.

Q. You surveyed her for the purpose of underwriting.

A. I surveyed her—it is my duty in case a ship is underwritten by Lloyd's, when they are damaged, to have repairs made so as to replace the vessel in the same condition as she was before, at the least cost.

Q. Did you have insurance on her at this time?

A. I do not know. I believe so, or else I would not have been called in.

Q. By whom were you called in?

A. By the agents.

Q. By the agent of Lloyd's?

A. Yes.

Q. So you made your survey as Lloyd's agent and at the direction of Lloyd's agency and not under the employment of Mr. Green?

A. Not under the employment of Mr. Green.

Q. Do you know whether that company paid the liability on the face of the policy for the bill of repairs rendered?

A. Yes sir, for I approved the bills.

Q. Did you approve these bills?

A. Yes sir.

Q. These bills were submitted to you after the repairs were made?

A. Yes.

Q. And approved by you as a repair bill incident to the collision?

A. Of the accident, yes.

Q. How long before that had you surveyed the Rosalie?

A. I cannot recollect just now, I have surveyed her so many times.

Q. How long have you known the Rosalie?

A. I have known the Rosalie for the last—had to do with her for the last 12 years.

Q. How old is she?

A. I could not tell.

Q. Do not know anything about that. What kind of a frame has she?

A. I only speak from what I know; I have dealt with her for 12 years.

Q. From what you know of her, what sort of frame has she?

A. She is a good ship.

*Redirect Examination:*

Q. (Mr. Robinson). Then, if I understand you, you were not surveying her for the Inland Navigation company at all, you represented the insurance?

A. Yes sir.

Q. Do you know who is their surveyor, ordinarily?

A. Frank Walker.

(Witness excused from the stand).

C. H. J. STOLTENBERG, a witness called on behalf of the libellant, being duly sworn, testified as follows:

Q. (Mr. Robinson). You are secretary and treasurer of the Inland Navigation company?

A. Yes sir.

Q. And have been for a number of years?

A. Yes sir.

Q. And were at the time the Rosalie came in collision with the Tillicum and scow?

A. Yes sir.

Q. Have you in your possession the bill which was rendered by the Heffernen Dry Dock company for the repairs made to the Rosalie at that time?

A. Yes, I have.

Q. And was that bill paid by your company?

A. It was.

Q. And have you also the receipt of the Heffernen Dry Dock company?

A. Yes sir.

Q. And the statement of the bill?

A. Yes sir.

Q. And these are all bound together there in one paper?

A. Yes sir.

MR. ROBINSON: I offer these papers identified by the witness in evidence.

Papers marked libellant's exhibit "B", filed and returned herewith.

Q. Mr. Stoltenberg, do you recollect how many days the Rosalie was laid off, as a result of this accident?

A. Yes, from the 19th to the 16th of April.

Q. Where does the Rosalie run, what is her ordinary run?

A. San Juan islands.

Q. San Juan island route.

A. Yes sir.

Q. Does she carry the mail, or did she at the time of the accident?

A. Yes, she is a mail carrier, has a mail contract.

Q. Was it necessary for you to keep a boat on the route at that time?

A. Yes sir.



Q. What about the wages of the crew of the *Rosalie* during these eight days, were you compelled to keep a crew?

A. Yes sir, we have to have a crew on while laid up undergoing repairs.

Q. That is their wages go on during that time?

A. Yes, a certain number of the crew.

Q. I will ask you, Mr. Stoltenberg, if you have had made up by your head book keeper, and also have examined the original records yourself, in your office, and can tell us in the aggregate what amount of wages that crew were paid during the eight days?

A. We kept seven men of the crew on the ship during the eight days and paid them \$130.80.

MR. ROBINSON: I offer this sheet showing the statement taken from the records of the office as to the crew and amount paid, in evidence.

Paper marked libellant's exhibit "C", filed and returned herewith.

Q. I understood you to say that it was necessary to keep a boat on that run?

A. Yes.

Q. Did you put another boat on the run?

A. Yes sir. The *Waialeale*.

Q. Do you know what the charter value of the *Waialeale* is?

MR. HUGHES: I object as immaterial.

A. Two hundred dollars per day.

Q. She belongs to your company?

A. Yes sir.

Q. Do you know what the actual crew expense of the *Waialeale* is?

MR. HUGHES: I object as immaterial.

A. \$140 to \$145 a day.

*Cross Examination:*

Q. (Mr. Hughes). What was the *Waialeale* doing prior to the time she was put on the run?

A. Spare boat.

Q. You kept her as a spare boat?

A. Generally as a spare boat; sometimes a regular run, and sometimes used as a spare boat.

Q. During that period she was not on any regular run?

A. No.

Q. And was held and used to fill in when the occasion arises because of your having to lay up some other boat on a run?



A. Yes sir.

Q. That is she had no regular run, but was used to take the place of boats that had a regular run during periods of their being laid up?

A. She did not have a regular run during that time.

Q. During that period she was used as a spare boat?

A. Yes sir.

Q. And you so used her at this time in consequence of this injury to the Rosalie?

A. Yes sir.

Q. The Waialeale was a much larger ship than the Rosalie?

A. A little larger, I think.

Q. She used to run between here and the Sandwich Islands?

A. She ran locally around the Sandwich Islands.

Q. Did your company pay the amount of this bill to the Heffernan Dry Dock company?

A. Yes sir.

Q. Did they collect the amount of it as insurance?

A. I could not state; I do not remember about that.

Q. Did not you attend to that?

A. I would have to look at the records first to see.

Q. To the best of your recollection what is the fact?

A. I could not tell you; I would have to look it up.

Q. You carried full insurance, didn't you?

A. A certain per centage of insurance, not full. We only insured certain vessels for a certain amount.

Q. That was sufficient to cover this injury?

A. That I could not tell you. I would have to look it up.

Q. Do you know whether the insurance companies accepted this statement and this bill of expenditure as a basis for their settlement?

A. That I could not tell you.

Q. How long prior to this time had the Rosalie been in the Dry Dock?

A. I could not tell you.

Q. How long had it been since she had undergone any repairs?

A. I could not tell you that.

Q. Anybody about your concern that would know?

A. I could tell by looking at the records. That is back over two years now.

Q. Did you give attention supervising the repairs?

A. No sir.

Q. You do not know personally what repairs were actually made?

A. Not outside of that bill.

Q. And your knowledge is from the fact that this bill was received and paid by you?

A. Yes sir, O. K'd.

Q. You do not know then whether it included anything else than the repairs necessary from the collision or not?

A. That is not my part of the business.

Q. The crew you speak of, a list of which was introduced here as exhibit "C", was that the crew that remained on board the *Rosalie* during the period of her repairs?

A. Yes sir.

Q. And the crew that remained on the ship rendered such assistance as it could.

A. Yes sir.

Q. And that entire number was all the time aboard the *Rosalie* and rendered such assistance and did such work as they were requested to do during the period of repair?

A. Yes, as shown on that list; some of the men were not on there all the time, not the full seven. It is shown there.

Q. In other words, what I am trying to get at, these men did not do other work for the company at this time for which they were paid as shown by this exhibit?

A. No sir, they were on this vessel.

Q. And were paid at the rate of wages shown here?

A. Yes sir.

(Testimony of witness closed).

CAPT. JAMES FOWLER, recalled, testified on behalf of the libellant as follows:

Q. (Mr. Robinson). Captain, showing you that part of libellant's exhibit "B" which purports to be the bill from the Heffernan Dry Dock company, I will ask you to examine that, reading the heading and see whether that is the bill for repairs on the survey which you have testified about?

A. Yes sir, that is the bill.

Q. Does that heading there describe the repairs you described, the same items which you recommended should be made at the time?

A. Yes sir.

*Cross Examination:*

Q. (Mr. Hughes). I understood you to say that you O. K'd the bill. Do you find your O. K. on that bill?

A. No sir, not on that one.

Q. Without having the bill you O. K.'d, could you speak from memory, after this lapse of time, captain?

A. I remember the heading there is exactly as the damage.

Q. The heading, but the items, you could not remember these after this length of time?

A. I remember the whole thing. I do not know about the items, I am only looking at the heading here. I believe from what I see there of the time and material that that is the bill that I approved.

(Testimony of witness closed).

JOSHUA GREEN, recalled on behalf of the libellant, testified as follows:

Q. Mr. Robinson). Mr. Green is the Waialeale very much the same class boat as the Rosalie or not?

A. I expect the Waialeale will carry more than the Rosalie but she will not carry any more passengers; she will carry a little more freight.

Q. Carry any more crew?

A. No; about the same sized crew. She has more freight capacity, but is not quite as fast a boat as the Rosalie. You might call her a little bigger, but they are just about the same class with each other; they are in the same trade.

Q. What would you say the charter value of the Waialeale is?

Mr. HUGHES: I object as immaterial.

A. We have a regular price that we fix on these boats; charter at a fixed price.

Q. What is that price?

A. Two hundred dollars for the Waialeale.

Q. What is the operating cost per day of the Waialeale?

A. Depends on the run she is operating on. From \$130 to \$150, possibly \$160 a day. About \$135 to \$140 per day.

Q. Mr. Green, who do you call your company surveyor; who ordinarily does your surveying?

A. Frank Walker.

Q. Did Frank Walker for you, or both of you, see this boat when she was in dry dock, and look after the repairs?

A. Yes sir.

Q. Did you personally see that the repairs were made?

A. Yes sir.

Q. Did Mr. Walker supervise it at the time?

A. Yes. I usually go down to the dry dock and see that the repairs are being made. When I do not go Mr. Burns, our general manager himself with Mr. Frank Walker whose business it is to see that it is done. And the underwriters

usually call in their own surveyor, which in this instance happened to be Capt. Fowler; in some instances captain Gibbs; there are two or three surveyors here. Frank Walker is our Company man, paid by our company and looks out for the company's business.

Q. Do you know, or not, whether there were any other repairs made on the *Rosalie* at that time?

A. I think there were. This bill covers the actual repairs to the stem that were caused by this accident only. Now I think there were some other repairs made. When a boat gets on a dry dock for anything wrong, we fix up everything. The accident must have its own particular bill and particular survey, and this bill covers that accident in the collision with the *Rosalie* and *Tillicum*, nothing else.

*Cross Examination:*

Q. (Mr. Hughes). Mr. Green, did you have a separate bill for the other repairs made at this time?

A. Yes, if there were any other repairs made, and I think there were. They were not heavy repairs. In fact, I think I wrote you at the time that the whole bill amounted to about five thousand dollars. In looking that up I found that there were some of these repairs that had nothing to do with this collision at all. Probably repairs to the engine or some part of the stern, that were not connected with this.

Q. Did the insurance company settle with you for the insurance, on the basis of this bill?

A. I do not know whether they did or not. I do not know whether we have made any insurance collection on that, but if they settled with us at all it would be on that bill.

Q. If you do not know, your book keepers would know?

A. Yes sir. I suppose that they made a claim for the insurance. I know it sometimes takes a year and sometimes five, to get our collections from the underwriters. But in a collision case we never collect in full. For instance, I might say that the *Rosalie* is insured for 65% of her value, of her full value. In case of a claim, the underwriters would pay us sixty-five per cent of the damage in the case, then they would deduct one quarter of that 65% in a collision. You only collect three fourths of your collision damage. You would collect on 65% less one quarter and they would take a third off for the new replacing the old. Which would leave you, if we put in a claim, one quarter of sixty-five per cent and thirty-three and a third per cent off that. So you get from the underwriters a very small portion.



Q. You mean three quarters of sixty five per cent, less thirty three and a third.

A. Yes sir.

Q. Now they deduct thirty three and a third because they put in new materials instead of old which would make the ship better and stronger?

A. They claim so, but as a matter of fact it is not, because the new material they put in does not last any longer than the balance of the old material of the vessel; but that is a provision in insurance.

Q. Do you know whether this is a correct bill of the cost of the repairs caused by this collision?

A. I am sure it is, for both the surveyors O. K'd the bill and that it is absolutely correct.

Q. When you speak of the charter price you put on your boats, that is when they are used for a day or two at a time on special runs?

A. Yes, or thirty days we probably would reduce it a little, but very little. We are entitled to twenty five per cent profit for the chartered boat. We have a regular set price on these boats that we charter them at, and we charter them to outsiders the same as we do to the company in any case.

Q. You find it necessary to keep a boat like the Waialeale to take the place of the other boats when they are laid up for repairs or accidents or anything of that kind?

A. Well, we do not keep it for that purpose. We find that we have more boats idle in the winter that we cannot run than in the summer. We cannot run as many boats in the winter as in the summer; we only keep as many boats in the summer as we actually operate in the busy season. But in a wider sense, some of these boats are necessarily laid up, and we find it necessary to have some of them laid up pretty nearly all the time, in order to take care of the mail routes. And all except three or four months in the summer time we are having a boat laid up. This Waialeale is on a regular mail route to Clallam Bay and return, but in the winter time she probably will be laid up as a spare boat. Everything we have now is running except the Chippawa and possibly the City of Everett.

(Testimony of witness closed).

*Libelant rests*

Hearing adjourned.

SEATTLE, WASHINGTON, *September 5, 1913.*

Present: Mr. Robinson for the libelant. Mr. Hughes for the claimant.



*Claimant and Cross-Libelant's Testimony.*

Capt. E. W. CHARLESWORTH, a witness called on behalf of the Claimant and cross-libelant, being duly sworn testified as follows:

Q. (Mr. Hughes). What is your business?

A. Master mariner.

Q. How long have you been a master mariner?

A. Some 14 years.

Q. Do you hold a master's license on the Inland Waters of Puget Sound?

A. Yes sir.

Q. How long have you held a master's license on Puget Sound and tributary waters?

A. Fourteen years.

Q. In what service have you been engaged during that time?

A. Master and pilot.

Q. On what waters.

A. Puget Sound and the adjacent inland waters; coast-wise to Cape Flattery.

Q. In the month of April 1911 of what vessel were you master?

A. The tug Tillicum.

Q. The tug Tillicum belonged then and still does to the Stimson Mill company?

A. Yes sir.

Q. How long had you been master of the tug Tillicum prior to that time?

A. Since 1903, the first day of April.

Q. Are you still master of the Tillicum?

A. Yes sir.

Q. Who was mate in 1911?

A. A. W. Anderson.

Q. How long had he been with you as mate on the Tillicum prior to the 8th of April, 1911?

A. I could not tell you just exactly.

Q. Is he still with you as mate of the Tillicum?

A. Not now.

Q. He is not?

A. No sir.

Q. You are still master of the Tillicum.

A. Yes sir.

Q. The tug Tillicum—I will ask you if the following statement contained in the libel as descriptive of the Tillicum is correct: She is a steam tug 87½ feet in length, 19½ feet in breadth, and draft 10 feet 6 inches, and 160 tons gross tonnage?

A. Yes sir.

Q. And on April 8th did she have a barge in tow, Stimson's barge No. 8?

A. Yes sir.

Q. The size of that barge is 100 feet in length and 28 feet in breadth.

A. Yes 100 feet long and 28 feet wide over the outside of everything.

Q. Now you may state whether you started on the morning of April 8th 1911 with the barge, Stimson barge No. 8, as a tow, if so from what wharf and at what hour?

A. It was April 8th 1911, we left the Standard Oil Dock at 4:15 a. m.

Q. How was the barge made fast?

A. Port side.

Q. State how it was situated on your port side? Lashed to your port side?

A. Lashed on the port side about thirty feet forward of the Tillicum.

Q. The bow of the barge was about 30 feet forward of the bow of the Tillicum?

A. Yes sir.

Q. What load did the barge carry?

A. Two oil tanks, oil cars.

Q. Were they oil cars, tank cars?

A. Yes sir.

Q. On regular cars with tanks.

A. I don't know what you call it, oil tanks or oil cars. The tanks are on the cars.

Q. How were they loaded on there?

A. They are loaded on a railroad track that runs on it, on wheels.

Q. A railroad track that runs direct in the center of the barge and they are run right on that track and made fast with chains on the track?

A. Yes sir.

Q. You left, you say, at 4:15.

A. 4:15 a. m.

Q. Where were you tow this barge with the oil tanks?

A. Marysville.

Q. What was the weather?

A. Thick fog.

Q. Now you proceeded from the port of Seattle to make West Point light first, did you not, on that trip?

A. Four Mile rock.

Q. Four Mile Rock?

A. Yes.

Q. There is no light at Four Mile Rock?

A. No sir.

Q. How do you locate Four Mile Rock in a fog?

A. By the whistle, get an echo off the place.

Q. Four Mile Rock is off Magnolia Bluff?

A. Yes sir.

Q. What speed were you running from the time you left and got under way until you picked up your echo at Four Mile Rock?

A. I judge about five miles an hour.

Q. Fog continuing all the time?

A. Yes sir.

Q. What whistles did you give?

A. One long followed by two short, every minute.

Q. Is that the regular fog signal for a tug with a tow?

A. Yes.

Q. Now, after picking up that echo from Four Mile Rock, what did you do?

A. Slowed down to about three miles an hour.

Q. For what purpose?

A. To locate the position and change course for West Point light house.

Q. How did you locate the position in the fog?

A. By this echo off the bluff.

Q. Ran slow along there so as to get your echo from the bluff?

A. Yes sir.

Q. And located yourself with reference to West Point light how?

A. By the sounding of the whistle.

Q. And this echo.

A. Yes.

Q. And you are able to tell where you are when you lose the echo, so that you can change your course for West Point?

A. Yes sir.

Q. And so you can round West Point.

A. Yes sir.

Q. What course were you on?

A. I do not know.

Q. Who would know?

A. The mate, who was steering.

Q. The mate is here?

A. Yes sir.

Q. Now, how long after you were running at your slow

speed and hearing your echos from the bluff, before anything occurred?

A. I should judge in the neighborhood of about five minutes.

Q. About what speed would that be that you were running?

A. About three miles an hour, as we slowed up.

Q. What then happened, captain.

A. We really got an echo dead ahead.

Q. Had you heard any other fog signal ahead of you?

A. No sir.

Q. What echo did you get ahead of you?

A. Some floating object.

Q. An echo from some floating object.

A. Yes.

Q. An echo of what?

A. I judged a steamer.

Q. I mean what was it echoed, not what was the object from which your echo came, but what was it you got the echo of? You had been getting echos from the bank?

A. Yes.

Q. What echos did you get from the bank, echos of your own whistle?

A. Yes, steam whistle.

Q. What echo did you get from ahead of you?

A. From the whistle.

Q. Echo of your own whistle.

A. Yes sir.

Q. Well, you got an echo after you sounded your fog whistle, you heard the echo ahead of you?

A. Yes, from the whistle.

Q. From some object ahead of you?

A. Yes.

Q. What did you take that to be?

A. A steamer.

Q. You knew there could not be any land ahead of you?

A. No sir.

Q. What did you do as soon as you got the echo ahead of you?

A. Stopped her.

Q. Well, did you signal to the engineer?

A. Yes sir.

Q. What signal did you give?

A. Stop bell.

Q. What is that?

A. One bell.

Q. Did you see any object at that time ahead of you?

A. No sir.

Q. Who was on the lookout with you?

A. I was the only one on the lookout

Q. Where were you?

A. In the pilot house.

Q. Who else was in the pilot house?

A. The mate.

Q. Was he on duty in the pilot house also?

A. Yes sir.

Q. How is the pilot house constructed with reference to seeing ahead, open windows?

A. Open windows, yes.

Q. The windows down?

A. Yes sir.

Q. So that you could see ahead of you, both you and the mate?

A. I do not know how the mate's window was, whether open or not. I had two windows down on the port side.

Q. Well, after getting an echo from your fog whistle, did you proceed until you gave another fog whistle? Did you give any other fog whistle?

A. Yes sir.

Q. In the mean time did you hear any fog whistle ahead of you?

A. No sir.

Q. About how long after the first fog whistle was it until you gave the second fog whistle, that is the first one from which you got the echo ahead?

A. Somewhere around a minute.

Q. And did you hear an echo from ahead of you from your whistle?

A. Yes sir.

Q. What did you do then, or what happened then?

A. Well, the loom of the lights of the *Rosalie* loomed right ahead of us. I gave full speed astern.

Q. You gave what?

A. Full speed astern.

Q. What else?

A. Immediately I gave a danger whistle.

Q. What is that?

A. Four blasts of the steam whistle.

Q. Did the *Rosalie* answer it?

A. Yes sir.

Q. Now up to the time you heard an answer to your danger whistle, had you heard any whistles from the *Rosalie* ahead of you?



A. No sir.

Q. What was the next thing you did?

A. Gave three blasts of the whistle notifying the man in the wheelhouse I was going full speed astern.

Q. Three blasts of your whistle would inform the Rosalie that you were going astern full speed, would it?

A. Yes.

Q. Now what is the next thing that occurred?

A. Then followed the collision. The collision occurred after the three blasts of the whistle.

Q. Well, about how long did it seem to you after she loomed up and the danger signal and three blasts were given, before the collision?

A. Just a few seconds, a few minutes, I could not tell just how long it was. That is pretty hard to say just how long it did take. It was not but a very short time after the three blasts were given.

Q. About how many seconds did it seem to you to be. Of course we know you cannot tell very accurately.

A. I cannot say how long.

Q. Well, about how far away did the Rosalie appear to you to be when her lights first came out before you?

A. I cannot say that. It was deceiving in the fog, awfully deceiving, pretty hard to judge distance in the fog. A person to tell exact would have to have a watch in his hand all the time.

Q. Could you tell whether at the time or prior to the time of the collision, your vessel was making sternway?

A. I did not understand you.

Q. Was your vessel going astern at or prior to the time of the collision?

A. Yes, she was going astern before the collision.

Q. Before the collision.

A. Yes sir.

Q. About how long before the collision, about how many seconds would you say, I mean, making sternway?

A. Forty or fifty seconds, something like that. It is hard to tell the time.

Q. Now how could you tell that she was making sternway?

A. The water was leaving her, she was going astern; you could tell by the foam in front of us.

Q. When you are reversed full speed astern, how does your boat, the Tillicum, when she has a tow on her port side, swing?

A. Swings to starboard; always swings to starboard.

Q. The tow this time was on the port side?

A. Yes sir.

Q. How did the *Rosalie* appear to strike you, and how did the two boats appear to act when they came together?

A. Head on.

Q. Yes, but were you swung by the collision any?

A. Swung to starboard, yes.

Q. Swung bow on around.

A. Swung around after the collision with the *Rosalie* hitting helped swing her around.

Q. Did the collision appear to be severe, was it a heavy shock?

A. Yes sir.

Q. What did the *Rosalie* do?

A. She backed off in the fog, backed away from us after the collision and proceeded to Seattle.

Q. Did she come up and speak to you again before she proceeded to Seattle?

A. She never came near, she backed off far enough so that she could hear us talk, but never came near us after the collision.

Q. But she was near enough to be in sight?

A. We could not see her on account of the fog; the fog was thick.

Q. You could see the lights?

A. We could see the loom of her.

Q. Which side of you was she on?

A. The starboard side.

Q. And you could hear her officers speak to you?

A. Yes sir.

Q. And ask you if you were injured, did he?

A. I asked him.

Q. What did he say?

A. I asked him, I says, are you all right, captain. Sam Barlow was on her and I knew him well, and I says, are you all right, and he says are you all right, and I says I am all right but you knocked the tank in the bay, one of the cars off the scow, and they proceeded to Seattle.

Q. What did you do after that?

A. I turned the scow around and proceeded to Ballard.

Q. Did you examine the scow and her cargo to see——

A. We lashed the tanks in case of any more jars so that we would not lose them overboard.

Q. Did you go aboard and examine her before you started ahead?

A. Yes sir.

Q. Now what I want to get at is, what condition you found things in right after the collision on the barge?

A. We found one of the stanchions broke on the starboard side of the scow; all the chain lashings, eight lashings of chain, big, heavy galvanized chain and turnbuckles all broke, and the two front trucks of the tank were lost off the boat and one of the tanks was hanging over the end of the barge.

Q. In other words, when the collision occurred the car broke these chains and went forward far enough to drop the front wheels?

A. Yes, and they dropped off into the bay; the two front axles dropped in the bay and the wheels and the bunkers.

Q. But the tank itself, did you lose that off into the bay?

A. The tank was hanging over in this position, like that. (Showing).

Q. But it did not drop into the bay?

A. No.

Q. It hung over the edge of the barge?

A. After the collision we lashed this tank on the barge so that we would not lose it.

Q. Captain, did you then, or after you got into Ballard, examine the front of your barge to see how the collision occurred?

A. Yes sir.

Q. What was the appearance of the front of the barge?

A. It was all smashed up, smashed in in the bow.

Q. Where did the bow of the *Rosalie* strike the barge, what part of the barge?

A. On the starboard corner.

Q. How near to the extreme corner?

A. I should judge from two and a half to three feet from the corner. I do not know exactly, I never measured it, but I should judge about that, two and a half feet.

Q. Knocked off the iron there?

A. Yes sir.

Q. Making a dent in the barge.

A. Yes sir.

*Cross Examination:*

Q. (Mr. Robinson). Captain Charlesworth, how much of a crew did you have on that morning?

A. Eight of a crew, that is all told.

Q. How many men were on duty?

A. Four.

Q. Where were they?

A. Two in the pilot house and two in the engine room.

Q. Two in the pilot house and two in the engine room?

A. Yes sir.

Q. These tank cars were one ahead of the other, single file, on the barge, I suppose?

A. Yes sir.

Q. And how near the front of the barge did they come, did they come right up to the front?

A. No sir.

Q. About how far back?

A. About fifteen feet from the head end.

Q. About fifteen feet from the head end?

A. Yes sir.

Q. Then I suppose the force of the collision broke the lashing and ran them up ahead?

A. Yes sir.

Q. You said, I believe, that the tug was lashed thirty feet back of the barge, about?

A. Yes sir.

Q. Did you mean the bow of the tug?

A. Yes sir.

Mr. HUGHES: The tug was not lashed to the barge, but the barge to the tug.

Q. Thirty feet ahead of the tug.

A. The barge was about like this (showing) about thirty feet forward here.

Q. How far back would it be from the bow of the tug to your pilot house?

A. I never measured.

Q. Just guess at it, just give what you think is right.

A. About twelve feet.

Q. And you stood in the pilot house above the water, captain, about how high would your head be from the water, standing in the pilot house?

A. Sixteen feet, something like that; she has a pretty high pilothouse.

Q. How high would these tank cars be set up on deck there? Could you see over the top of these cars?

A. Yes.

Q. How high does the barge stand out of the water when she is loaded?

A. When she is heavy loaded?

Q. As she was then.

A. About four feet aft and six feet forward.

Q. How high is the tank car?

A. It would be about 14 feet to the top from the water's edge.

Q. You are counting the tank and the barge now?



A. Yes sir. It is up high enough so that I can look clear of it from the pilot house, I can look over the barge.

Q. That is with the cars on it.

A. Yes, with the cars on it.

Q. You would not be much more than able to, just about look over it?

A. You have got plenty of room to look over it.

Q. There was nobody on the barge at all, was there?

A. No sir.

Q. Now did you have any light on the barge?

A. Yes sir.

Q. What was it?

A. Red light.

Q. Where was it?

A. On the port corner, forward, port bow.

Q. Not in the middle?

A. No sir.

Q. Now you said, I believe, that you were making about five miles an hour on this morning, from the Standard Oil dock up to the vicinity of somewhere——

A. I should judge somewheres about five miles an hour.

Q. I suppose that was about as good as you could do?

A. That is the best she could do, is five miles an hour.

Q. And then you were stopped for how long? Were you stopped or going slow, rather, for about how long?

A. We slowed down in the neighborhood of five minutes.

Q. Was that for the purpose of getting an echo, as I understood?

A. Yes sir.

Q. What kind of whistles were you blowing to get that echo?

A. Fog whistles.

Q. You were getting echos from one long and two short blasts?

A. Yes sir.

Q. Did you blow any signal whistle at any time?

A. No sir.

Q. Did you hear any other boats around there at all?

A. No sir.

Q. And throughout all this, or near the time of the accident, the only whistles you heard were the whistles of your own boat and the danger signal of the *Rosalie* about the time you came together?

A. Yes sir.

Q. What did you do when you got that echo that you testified to, the first time?



A. Stopped the boat.

Q. That is, you mean you stopped the engines.

A. Stopped the engines, yes.

Q. And then you drifted along until you got the second echo?

A. Yes sir.

Q. Then what did you do?

A. Full speed astern.

Q. How far do you think you could see that night, captain, to get the loom, how far do you think she was away when you first saw her, the *Rosalie*?

A. I should judge about 200 feet when I got the first loom, first sight of her. I could not say exactly, it is hard to say the distance in the fog.

Q. We all understand that, captain. Was it an especially heavy fog or an average fog?

A. Ordinary fog.

Q. Of course it was too early to get any light from the morning?

A. Just breaking at 5:15 in the morning.

Q. Do you know accurately when that collision happened, when you say 5:15, do you know to the minute?

A. In the pilot house in the *Tillicum*, by our clock, yes.

Q. That was the time by your clock?

A. Yes sir.

Q. Now, captain, you were asked about their standing by there. There was not anything that could be done?

A. No sir.

Q. You do not mean to convey the idea that they went into Seattle and deserted you, or anything like that?

A. No sir.

*Redirect Examination:*

Q. (Mr. Hughes). Could you tell about how far you were southeast of West Point light when this collision occurred?

A. I judge a mile and a half or two miles. I have no idea exactly how far it was.

Q. No way of telling exactly?

A. No sir.

Q. But you did note the time, did you?

A. Yes sir, 5:15 a. m.

Q. By your pilot house clock?

A. Yes sir.

(Witness excused).

A. W. ANDERSON, a witness called on behalf of the Claimant and cross-libellant, being duly sworn, testified as follows:

- Q. (Mr. Hughes). What is your business?  
A. Master mariner.  
Q. How long have you held a master's license?  
A. One year.  
Q. How long have you held a mate's license?  
A. I had a mate's license about three years, I believe.  
Q. Three years prior to that?  
A. Then I had a mate and pilot's license after that.  
Q. What I want to get at is, since you first had a mate's license?  
A. About seven years.  
Q. About seven years and then after that for about three years you had a mate's and pilot's license?  
A. Two years, yes.  
Q. And then you got a master's license?  
A. Yes.  
Q. In what waters?  
A. Puget Sound and tributaries and to Cape Flattery.  
Q. You were mate on the tug Tillicum on April 8th, 1911?  
A. Yes sir.  
Q. How long prior?  
A. Two years and a half or two years and a quarter.  
Q. How long were you on the tug Tillicum altogether?  
A. I was on there about nine years before that.  
Q. In other capacities?  
A. Yes sir.  
Q. What are you on now?  
A. I am on the La Paloma.  
Q. What boat is that?  
A. Belongs to the Stimson Mill company.  
Q. Is it a tug boat?  
A. Kind of a tug, yes.  
Q. Will you state, captain, what occurred on the morning of April 8th, 1911?  
A. Well, at 4:15 we left the Standard Oil dock.  
Q. Having what in tow?  
A. The oil scow number 8.  
Q. How was she lashed to the Tillicum?  
A. On the port side, about thirty feet forward.  
Q. That is her bow was about 30 feet forward of the bow of the Tillicum?  
A. Yes sir.  
Q. What cargo did she have?  
A. Two tanks of oil.  
Q. How were they loaded on the barge?  
A. Well, they were a little bit aft of amidships, so that

the forward end of the scow would be higher than the aft end. They generally tow better that way, one end higher, the end going ahead is always higher.

Q. Was there a railroad track constructed on the barge on which these cars were run?

A. Yes sir.

Q. How were they made fast?

A. With chains lashed to the stanchions.

Q. How many chains and what kind of chain lashings?

A. Galvanized chains, about three quarters to one inch, something like that.

Q. How many chains were there?

A. Four on a side and on each end. Two on each side of each car.

Q. What was the weather?

A. Foggy.

Q. What were you doing?

A. I was at the wheel.

Q. You were at the wheel?

A. Yes sir.

Q. In the pilot house, of course.

A. Yes sir.

Q. Was your window down?

A. Yes sir.

Q. Any obstruction to your vision ahead and on either quarter?

A. No sir. Nothing except the window frames you know.

Q. And how high is the pilot house above the water?

A. Oh, approximately 16 feet.

Q. That is the floor of the pilot house?

A. No.

Q. The windows?

A. The windows.

Q. So that your vision would carry you——

A. About eighteen feet.

Q. About 18 feet above the water.

A. Yes sir.

Q. Did you testify that there was a fog that morning?

A. Yes sir.

Q. What kind of a fog, dense or ordinary?

A. Ordinary fog.

Q. What whistles were given by the Tillicum as you proceeded that morning?

A. Tow whistles, fog whistles.

Q. What whistle is that?

A. One long and two short blasts.

Q. At what intervals?

A. Well, about every minute, approximately; perhaps a little sooner, but it would be every minute.

Q. About what rate of speed would you say you were proceeding until you reached the vicinity of Four Mile Rock?

A. Oh about four and a half to five miles.

Q. What occurred then?

A. After reaching Four Mile Rock?

Q. Yes sir.

A. Well, before we got to Four Mile Rock, we were listening for echos, and after we got the echos why then we slowed down.

Q. About what rate of speed did you reduce to?

A. Oh, about three miles.

Q. What was the object of that?

A. To get our bearings.

Q. Is that necessary in going along past Four Mile Rock and from there to West Point in a fog with a tow, and if so for what purpose?

A. It is not particularly necessary, they don't all do it, but for protection, but they generally do it.

Q. What is the object of it? I want you to explain it.

A. So that in case the tide or something happened to set in one direction or the other, you will not run on the beach.

Q. But with the echos you can tell when the echos begin to disappear about how close you are to West Point, is that it?

A. Yes, you can find out, then when you begin to leave Four Mile Rock you see the echos begin to disappear then and after that they begin to get quite dense and you can haul around for West Point.

Q. You mean faint, don't you?

A. Yes sir.

Q. After the echoes begin to get faint.

A. Yes sir.

Q. So that you can only hear them slightly, then you know you are getting out where you can haul around?

A. Yes sir.

Q. What is the course as you go before Four Mile Rock, before you make the turn?

A. West by north half north.

Q. And at what point, how near West Point light, do you change your course?

A. Oh, approximately, in a fog it would be about a mile and a half or a mile and three quarters from West Point.

Q. Passing along a little further, so that I do not forget

it, were you at this point where you change your course before the collision occurred that morning?

A. No sir.

Q. You had not reached it. Now about how far had you heard the echos from the shore as you were passing Four Mile Rock that morning, had you lost the echos yet from the shore?

A. No sir.

Q. Before this collision occurred?

A. No sir.

Q. Did you hear any fog signal from the vessel ahead of you?

A. No sir.

Q. Or in any direction from you as you passed along there?

A. No sir.

Q. Just prior to the collision, for ten or fifteen minutes?

A. Nothing but the light house.

Q. You heard the light house signal, did you?

A. Yes sir.

Q. You can always recognize that, can you?

A. Yes sir.

Q. Well, what was the first indication that you got that morning that there was any object ahead of you in the water?

A. Well, we got the echo pretty near dead ahead, or approximately dead ahead, a faint echo.

Q. What was that an echo of?

A. That was from our whistle.

Q. Did it sound as though it were faint and some distance off?

A. Yes sir.

Q. What did you do, what was the first thing that the captain did?

A. Slowed down, sir.

Q. That is he gave a bell to the engineer?

A. Yes sir.

Q. To slow down.

A. Yes sir.

Q. Could you tell by the movement of the vessel that the engineer had slowed down?

A. Yes sir.

Q. Now tell what happened after that?

A. Well then, after he slowed down, we blowed the towing whistle again.

Q. Were you both watching ahead to see if you could observe her or see any object?

A. Yes sir.



Q. Did you see or hear anything before you gave your next fog whistle?

A. No sir.

Q. You gave a second fog whistle. Did you get an echo?

A. Yes sir.

Q. Was there any answer to your fog whistle?

A. No sir.

Q. What was the next thing that occurred, captain?

A. The next thing the captain rang the bells to back.

Q. Did you see any glimmer of light ahead at the time that he gave that bell, did you yourself see any glimmer of light when he gave that bell?

A. The captain says, there are some lights. I just commenced to see them about the same time, after he spoke.

Q. And was that the time he gave the bell to go full speed astern?

A. Yes sir.

Q. What was the next thing he did?

A. Gave four blasts of the whistle.

Q. What signal is that at sea?

A. It is a danger signal.

Q. Was that answered?

A. Yes sir.

Q. Were the lights coming closer all the time?

A. Yes sir.

Q. What lights did you take them to be, the range lights of the ship, mast head lights.

A. Masthead lights, yes.

Q. Did the vessel ahead of you make any answer to your danger signal?

A. Yes sir.

Q. What answer?

A. He blew a danger signal.

Q. That is four blasts.

A. Yes sir.

Q. Now were these the first blasts that you heard from the ship ahead of you?

A. Yes sir.

Q. What was the next thing that happened?

A. Then the captain blew three whistles.

Q. The captain of the Tillicum?

A. Yes sir.

Q. What was that signal?

A. Signifying that we were going full speed astern.

Q. And what is the next thing that happened?

A. Well then, just about that same time the collision happened.

Q. The collision followed quickly after the last signal, did it?

A. Yes sir.

Q. How did that collision appear to you, describe it the best you can, captain, was there much shock to it?

A. Not such a great shock.

Q. Not on your boat?

A. No sir.

Q. Can you tell from the examination that you made afterwards how much shock there was to the barge?

A. Well, that is pretty hard to answer. It parted all our lines.

Q. Broke these chains, didn't it?

A. Broke the chains, yes.

Q. What happened to the car?

A. Well, the cars ran ahead then. You see there are blocks on the track, two blocks at the ends on each track, each end of the cars, besides the chains. The head car here was jumped right over or knocked them out, I would not say positive, whether she jumped over or knocked the blocks out of the head end.

Q. You mean the car.

A. Yes, the front wheels.

Q. The car either jumped over or knocked them out.

A. Yes sir. And they ran out over the end of the scow, the first car, and the head truck dropped off and went in the bay.

Q. That you discovered after you had time to examine it, of course.

A. Yes sir.

Q. Now how was your boat swinging at the time and just prior to the collision, was she going straight ahead or was she swinging?

A. Swinging.

Q. Was she going ahead or astern?

A. Going astern.

Q. Which way was she swinging?

A. Well, her bow was swinging to starboard.

Q. What effect did the collision have on her swinging to starboard?

A. It helped swing her so much faster.

Q. How long did the two vessels seem to be together, how long did the bow of the Rosalie appear to be in contact with the barge?

A. Just a few seconds.

Q. Did the bow of the Rosalie appear to pass in front of you as you swung around?

A. Well, she did not exactly appear to go ahead of us to speak of. She just simply kind of hit us, and we kept on swinging and she just about stopped just about that same time.

Q. Did she back off then?

A. Yes sir.

Q. Now which side of her were you on after the collision when she backed away?

A. On the starboard side.

Q. Your port side was on her starboard side?

A. Yes sir.

Q. And did you observe the lights, West Point light, could you tell from the West Point light which way you were headed after the collision occurred and swung around?

A. Well, I heard the West Point light fog signal; it sounded off on our port side.

Q. So that you would be heading which way?

A. Toward the beach.

Q. You stopped finally, did you?

A. Yes sir.

Q. Did the captain give the signal to stop after the vessels were entirely clear?

A. Yes sir.

Q. And at that time you swung around so that you would be heading toward the beach and the Rosalie was on your port side?

A. Yes sir.

Q. You were on the starboard side of the Rosalie, were you?

A. Yes sir.

Q. That is after the collision.

A. Yes sir.

Q. And after the two vessels had parted and backed off from each other.

A. Yes sir.

Q. I think you testified that your vessel was making stern-way at the time the collision occurred, have you?

A. Yes sir.

Q. How could you tell that?

A. By the wake of the water going ahead of the bow.

Q. Did you notice it prior to the collision?

A. No sir.

Q. When did you first notice the water was churning ahead of you, the wake of the water?

A. Just before the Rosalie hit us.

Q. The first you observed that.

A. Yes sir. It was after I saw her lights, then of course when she got up right close I happened to look down toward the scow—she was going to hit us, you could tell by that time where she was going to hit, and I looked over the scow there on that side.

Q. You could see the water there?

A. Yes sir.

Q. And that was the first time that you had observed that the water was churning ahead of you?

A. Yes sir.

Q. Could you tell from the action of the boat, in your experience on the boat, whether she was going astern prior to the time or not. Or did not you give it attention?

A. I did not give it much attention, although I know she was backing.

Q. You knew that she was backing?

A. Yes sir. I could feel it on the wheel that the water was working on that side, taking it on the rudder, you can tell it. But I never gave it a thought as far as that goes, when she got so close as that I took observations to see where she was going to hit first.

Q. One way you have of knowing that she was going astern was when you looked down to see whether she was going to strike you and where, and you noticed as she approached and just before she struck you that the water was running away from you in front?

A. Yes sir.

Q. The white foam of the water.

A. Yes sir.

*Cross Examination:*

Q. (Mr. Robinson). Mr. Anderson, I did not quite understand the way these vessels brought up after the collision. You say that she was on your port after the collision?

A. Yes sir.

Q. That is the barge would be between you and the Rosalie then?

A. Well, kind-of, in a way, but the barge, you see the headlines broke when she hit the barge she kind of swung out and around at the same time.

Q. (Mr. Hughes). The barge, did you mean?

A. Yes. You see the barge, the two spring lines and the head line were broke and that let the scow swing away from the bow of the Tillicum, about that position, like that (show-



ing). You see this was the barge up here, and as soon as they broke we kind of swung further in that direction, out like that.

Q. You mean the bow of the barge swung away from the bow of the Tillicum?

A. Yes sir.

Q. (Mr. Robinson). Well then the Tillicum and the barge, speaking generally, appeared to be on the starboard side of the Rosalie a little, after the collision, didn't they?

A. Yes.

Q. And you got that echo out in front as you testified. What did you think it came from?

A. Expected some vessel or some object ahead of us.

Q. You knew there had to be something on the water, a vessel or something else, didn't you?

A. Yes sir.

Q. Could not have been anything else give you that echo?

A. No sir.

Q. You had been listening for these echos right along until just before the collision, hadn't you?

A. Yes sir.

Q. On the Bluff.

A. Yes sir.

Q. Seeing whether they were going to disappear or not.

A. Yes sir.

#### *Redirect Examination:*

Q. (Mr. Hughes). I do not think I asked you, captain, did you examine afterwards the bow of the barge to see how she was injured, and where, where the bow of the Rosalie struck her?

A. Yes sir, I did.

Q. Tell about that.

A. Well, I noticed that there was quite a hole cut there, the planks were badly smashed up at that particular spot.

Q. What part of the bow of the barge was struck?

A. Starboard corner, sir.

Q. About how near the extreme corner?

A. Two feet and a half.

Q. Then in addition to breaking the chains that held the cars, caused the cars to forge forward and hang over the bow of the barge, the collision also broke the lines with which the barge was also fast to the Tillicum forward?

A. Yes sir.

Q. So that only the aft lines held the barge to the Tillicum?

A. Yes sir.



Q. Of course you had to go aboard the barge to make her fast again, before you went on around to Ballard?

A. Yes sir.

Q. And you made the cars fast also so that they would not fall off?

A. Yes sir.

Q. And you never recovered the forward trucks of the cars, did you?

A. No sir.

Q. I forgot to ask the captain, but you may be able to answer, who was your chief engineer at that time?

A. Mr. LaBonte.

Q. Do you know whether he was on duty?

A. No, he was not.

Q. He was not.

A. No sir.

Q. Do you know what has become of him?

A. No sir.

Q. He is out of the country, however?

A. I could not say. I have not seen him for sometime.

Q. (Mr. Robinson). Mr. Anderson, how much higher would these cars be at the front, would they stand from the water at the head car than the rear. You said they would stand on an incline on account of the barge being higher in front?

A. Yes.

Q. How much higher would it be?

A. About three feet, sir.

Q. About three feet?

A. Yes.

Q. About how high would you think the front of the front car would be from the water?

A. About fourteen feet.

Q. How much of that would be the barge itself?

A. About five feet.

Q. As I understand these were the ordinary tank cars that we see going along the railroads?

A. Yes.

Q. Oil cars.

A. Yes sir.

Q. You have been on the tug *Tillicum* when she was towing a scow laden as this one was, I presume?

A. Yes sir.

Q. When the tug would be put full speed astern she would swing, would she not?

A. Yes sir.

Q. And would swing to starboard, would she?

A. Yes sir.

Q. Would she swing very fast under these conditions or would it be slow, or would she come around pretty lively, loaded as you were that night?

A. Not so very, no sir.

Q. Would it change the direction quite a good deal before you got sternway, actual sternway on the whole business, do you understand what I mean?

A. Yes. Well, approximately three points.

Q. Approximately three points.

A. Yes sir.

Q. You say you saw white water about your bow?

A. Yes sir.

Q. Did you see it all the way back? Or did you see it at bow of the barge do you mean?

A. Well, on the starboard side of the barge right ahead of the boat.

Q. Right ahead of the boat.

A. Yes sir.

Q. This barge has got a square end, has it not?

A. Yes sir.

Q. Square barge, rectangular?

A. Yes sir.

Q. (Mr. Hughes). Did you look down at the water at the side of the Tillicum?

A. No sir. I remember just ahead of her bow and along-side that scow on the starboard side of the scow.

Q. How did the water appear?

A. Well, it appeared to be broken up, you know, bubbling up from the scow.

Q. Would that appearance have been caused by the water from the Rosalie?

A. No sir.

Q. Why not, state your reasons?

A. Because it would come toward us from the Rosalie instead of leaving us.

Q. (Mr. Robinson). That water would be forty feet ahead of you, about forty feet to the bow of the scow, would it not, from where you were standing?

A. Yes sir.

Q. All of that.

A. Approximately.

Q. And do you mean to say you could tell which direction water was going forty feet ahead of you in this fog?

A. Yes sir.

(Witness excused).

W. A. ROUSE, a witness called on behalf of the Claimant and cross-libellant, being duly sworn, testified as follows:

Q. (Mr. Hughes). What is your business?

A. Marine engineer.

Q. How long have you been a marine engineer?

A. About fourteen years.

Q. Were you an engineer on the tug *Tillicum* on April 8th?

A. Yes sir.

Q. Were you on duty on the morning of the 8th of April, 1911, at the time the collision occurred that has been referred to in the testimony of the other witnesses?

A. Yes sir.

Q. Who was chief engineer?

A. A man by the name of LaBonte.

Q. Do you know where he is?

A. No sir, I do not.

Q. He is not here?

A. Not that I know of.

Q. Where was he at that time?

A. He was in his room.

Q. He would be in his bunk at that hour?

A. Yes sir.

Q. And you were the engineer on duty?

A. Yes sir.

Q. From the time you left the Standard Oil dock until the collision occurred?

A. Yes sir.

Q. After you got under way, what speed was maintained until you approached Four Mile Rock?

A. I do not know what speed the boat makes; I am not supposed to know that. We were not running her full speed—that would be the pass-over and wide open. But if she was making five miles an hour we could run her up to six, there would be that much difference between that and full speed.

Q. It would be four-fifths to five-sixths.

A. It would be about twenty turns difference.

Q. Now could you tell with that barge alongside about what speed you were making there?

A. No, I could not tell that. I have no way of knowing it. I do not keep a record of that on the boat. I know what we would make light, about nine or ten miles.

Q. But with a barge?

A. I would not know.

Q. Now did you have signals as you approached Four Mile Rock, to slow down?

A. I got a slow bell, yes sir.

Q. Well, you were engineer on her for some time?

A. I have been on her about 10 or 11 months.

Q. At that time.

A. Yes sir.

Q. Going out in a fog, is it customary as they get in the vicinity of Four Mile Rock to slow down for the purpose of getting echos?

A. Yes, we often slow down in a fog or whistles around the bay, but this morning we did not, we went right on out of the bay, but somewhere there they gave a slow bell.

Q. Now how long was it after that, how long had you been running under the slow bell before you got another signal?

A. Oh, I guess about five minutes, something like that, five or ten minutes.

Q. Running under a slow bell, you would drop down to about half speed?

A. Yes, just about half speed.

Q. What occurred after that?

A. Well, about a minute after that——

Q. I mean after you had been running under a slow bell you say for five minutes or thereabouts? What was the next thing that happened?

A. I got a stop bell.

Q. A stop bell.

A. Yes sir.

Q. What did you do?

A. I stopped the engine.

Q. What happened after that?

A. About a minutes after that I got two bells, to back up and a jingle.

Q. What would that mean then?

A. Wide open astern.

Q. That is your two bells and a jingle would be to reverse full speed astern?

A. Yes sir, two bells reverse and a jingle full speed.

Q. Then did you get any signal to open her wide from there?

A. A little jingle.

Q. A little jingle following that?

A. Yes sir.

Q. What did you do?

A. I gave her the pass-over, all she could stand.

Q. Astern?

A. Yes sir; all the engines would stand.

Q. What was the next thing that happened then to your knowledge?



A. The collision, there was a jar.

Q. About how long had you been running full speed astern before you felt the jar of the collision; what is your best judgment and recollection?

A. Oh, it was not very long, about fifteen or twenty seconds, I suppose, or half a minute, something like that.

Q. How long would it take you to get sternway running as you were at about half speed—you had been stopped for how long?

A. About a minute.

Q. And in that time how near would you overcome headway?

A. Well, she would not be making over a mile an hour, not that, I don't suppose; must have been pretty well stopped at that time.

Q. After you gave her full speed astern, had you been running long enough to give her sternway?

A. I should think so; she turned up three or four hundred revolutions before the collision, I think that would give her sternway, headway astern.

Q. It would?

A. Yes sir.

Q. Did you hear any fog signals or any other signals ahead of you?

A. I could hear them blowing fog signals coming out of the bay.

Q. You are speaking of your own boat?

A. Yes sir.

Q. After you heard the four whistles did you hear four whistles from the boat ahead of you?

A. There were several whistles following right along, I could not say.

Q. You could not undertake to distinguish them?

A. No, I could not.

Q. But down in the engine room you would not be able to distinguish or state that any whistles were ahead of you?

A. No, I could not state. I could hear our own whistles. That is right up above. This engine is a little bit on the main deck anyway and you can stand in the engine room and reverse the engine and look right out.

Q. Was your vessel giving regular fog signals that morning from the time you left the dock?

A. They were blowing regular signals, yes sir.

Q. That was one long and two short blasts of the whistles?

A. Yes sir.



*Cross Examination:*

Q. (Mr. Robinson). What time did you leave the Standard Oil dock, do you know?

A. About four o'clock, a little after four.

Q. Now then you ran at the same speed that you run at any time, didn't you, that is you did not use this cut-off in towing that you speak of?

A. Yes sir.

Q. That is you ran her as under any conditions?

A. No not as we run under any conditions.

Q. I mean as ordinarily towing.

A. Yes sir.

Q. And the first signal you got was a signal to slow?

A. Yes sir.

Q. About how long after you left the dock?

A. About an hour.

Q. Then did not you get any other slow bell after that?

A. I got a stop bell.

Q. There was only one slow and then the next bell was a stop?

A. Yes sir.

Q. The next signal came about how long after?

A. After I got the stop bell?

Q. Yes sir.

A. About a minute, I guess.

Q. You had charge of the engines?

A. Yes sir.

Q. Who else was down there with you?

A. The fireman.

Q. Yourself and this man were the only men on duty in your department?

A. Yes sir.

Q. How long did you say you thought you had been backing that boat before you felt the shock?

A. About 15 or 20 seconds, something like that. I don't know just how long; it was not very long.

Q. That is your best judgment, that it was something like that?

A. Yes sir.

*Redirect Examination:*

Q. (Mr. Hughes). The engine room and then the fire room was down below?

A. Yes the fire room was down below.

(Witness excused).

CAPT. E. N. CHARLESWORTH, recalled, testified as follows:

Q. (Mr. Hughes). Do you know where the engineer is?

A. No sir. He is back east somewheres. I heard he was in Michigan.

Q. He was not where he would have knowledge of what occurred?

A. He came out in his underwear after the collision.

Q. There is one matter I overlooked which I want to call to your attention. About how long after the collision was it before you got under way again?

A. I judge about five minutes when we got the barge turned around and got under way. I had to turn the barge around, and I think it took about five minutes, may be more.

Q. You had to lash the barge fast again?

A. Yes sir.

Q. Did you run out of the bank of fog?

A. Yes sir.

Q. When you got out of the fog bank about how far were you from West Point light?

A. Between a mile and a mile and a half, or a mile and a quarter.

Q. Was it clear so that you could see West Point all right?

A. Yes sir, everything was clear.

Q. Dense fog behind you still when you ran out of it?

A. Yes sir.

Q. The bank of fog was back of you after you were on your way to West Point light?

A. Yes sir.

Q. After starting ahead then you only ran a very short distance until you ran out of the fog?

A. Yes sir.

Q. That frequently occurs in the waters of Puget Sound, does it?

A. Yes sir.

*Cross Examination:*

Q. (Mr. Robinson). Ten minutes before you ran out of the fog bank or fifteen minutes, it might also have been possible that it was foggy up further. Do you get what I mean. It might have been foggy up towards West Point light fifteen minutes before, might it not, to some extent?

A. That is hard to say.

Q. You could not say it was not?

A. I could not say what the weather was down there at the light house at that time.

Q. You say it is possible for a fog to lay in a streak like that. It is also possible that the strip might have extended further down ten minutes before?

A. That is hard to say.

Q. It is not impossible?

A. It is possible that it may have.

Q. (Mr. Hughes). It would be very unusual, would it not?

A. Yes, very unusual.

Q. Do you know what time you passed West Point?

A. No sir.

(Witness excused).

CAPT. A. W. ANDERSON, recalled, testified as follows:

Q. (Mr. Hughes). How long after the collision before you got the barge lashed fast and under way again?

A. About five or six minutes, sir.

Q. You proceeded then towards West Point, did you?

A. Yes sir.

Q. Did you run out of the bank of fog?

A. Yes sir.

Q. Did you run out of it suddenly?

A. Yes sir.

Q. How far were you from West Point light when you got out of the bank of fog?

A. About a mile, sir.

Q. Entirely clear?

A. Yes sir.

Q. Was it clear all the way from the bank of fog to West Point light after you got out of the fog?

A. Yes sir.

Q. You could see the bank of fog behind you still?

A. Yes sir.

Q. Between there and south all along the shore?

A. It was foggy.

Q. That is not an unusual occurrence in the waters of Puget Sound?

A. No sir.

*Cross Examination:*

Q. (Mr. Robinson). You say it was clear for a mile this side of West Point light?

A. Yes sir.

Q. Then when you got up there, I suppose the fog whistle was not blowing at West Point, was it?

A. Now I could not swear to that.

Q. But you did swear on your examination in chief that you heard it blowing at the time the accident happened?

A. Yes sir.

*Redirect Examination:*

Q. (Mr. Hughes). They would blow the fog whistle if there was a bank of fog along Magnolia bluff?

A. Yes sir.

Q. Whether there was any fog at West Point light or not?

A. Yes sir.

Q. So as to warn vessels through that bank of fog?

A. Yes sir.

Q. Do you know what time you passed West Point light?

A. No sir.

(Witness excused).

W. A. ROUSE, recalled, testified as follows:

Q. (Mr. Hughes). I think you testified that your room was so situated that you could look out over the water?

A. Yes sir, I could look out on the starboard side; the scow was on the other side.

Q. Could you see all along that there was a dense fog that morning prior to the collision?

A. Yes sir.

Q. Now about how long was it after the collision before you got under way?

A. Five or ten minutes, something like that.

Q. After you had started on your course toward West Point, about how long was it before you got out of the fog bank?

A. About five minutes.

Q. Could you see a clear line of demarcation?

A. I could see the light, the whole point. I have seen it many times out there that way. The fog starts and settles in the bay and then goes right out and comes out by West Point. And you can see clear across the Sound as a rule.

Q. When it will be clear at West Point?

A. Yes sir.

Q. Did you ever work at West Point?

A. No, I never worked there but I lived there for ten years.

Q. What is the practice at the light house as to blowing the fog signal when there is no fog at West Point?

A. Well, whenever it gets down close to the point, when they cannot see across, that used to be the rule.

Q. That is to warn any vessels that might be passing through that fog?

A. Yes sir.

*Cross Examination:*

Q. (Mr. Robinson). When you cannot see across where?

A. Bainbridge island, about four miles across; but they often start the horn before that, if the fog is settling down toward the point, they might start the fog horn before that.

Q. You say you ran five or ten minutes before you came into the clear?

A. About five minutes, I think.

Q. Do you know what time you passed West Point that morning?

A. I guess about—I don't know exactly, about half past five, something like that.

(Witness excused).

Hearing adjourned.

SEATTLE, WASHINGTON, *Jan. 13, 1914.*

Present: Mr. Robinson, for the libelant. Mr. Hughes, for the Claimant.

CAPT. E. W. CHARLESWORTH, recalled on behalf of the Claimant, testified as follows:

Q. (Mr. Hughes). Captain Charlesworth, you were master of the tug Tillicum at the time of the collision with the Rosalie in April, 1911?

A. Yes sir.

Q. You have testified before as to the cause of the collision?

A. Yes sir.

Q. After the collision what did you do with the tug and barge?

A. Proceeded to Ballard.

Q. For what purpose?

A. To get some blocking.

Q. Then what did you do?

A. Had orders to go to Moran's ship yard.

Q. For what purpose?

A. To get the tanks hoisted out of the bay.

Q. That is out of the bow of the barge, they were hanging over in the water?

A. Yes sir.

Q. Was that done at Moran's?

A. Yes sir.

Q. While you waited there.



- A. Yes sir.
- Q. While you were there was the Rosalie also at Moran's?
- A. Yes sir, on the north side of the dock.
- Q. Did you see the Rosalie?
- A. Yes sir.
- Q. Did you see what damage was done to her?
- A. No sir, I never examined it.
- Q. You did not go aboard, do you mean?
- A. No sir, I did not.
- Q. Could you see it from the wharf there?
- A. Yes, I could see that his nose, his stem, was smashed in a little.
- Q. Above the water?
- A. Yes sir.
- Q. Not any indication of injury down below the water line?
- A. No sir.
- Q. It was all above the water line?
- A. Yes sir.
- Q. Now how much time was lost with your tug? and the barge?
- A. Twenty-four hours.
- Q. Caused by this collision?
- A. Yes sir.
- Q. What was the value of the use of the Tillicum for twenty-four hours?
- A. Sixty dollars.
- Q. The company owned the barge and the oil tanks?
- A. Yes sir.
- Q. What is the value of the use of the barge and the oil tanks?
- A. Fifteen dollars a day.
- Q. About how long after the collision was it before the scow or barge was repaired?
- A. After the tanks were raised out of the water the barge was repaired?
- Q. How long was it after this collision before the barge was repaired?
- A. I don't know how long afterwards.
- Q. Was it along about the 4th of July?
- A. Yes, somewheres around there.
- Q. Do you know what was the reason, why that was not repaired sooner?
- A. No sir.
- Q. Who did the repairing?
- A. Mr. McKay.

Q. Ship carpenter at Ballard?

A. Yes sir.

Q. You used the barge in the meantime?

A. Yes, in a leaky condition.

Q. The breakage was chiefly above the water line?

A. Yes sir.

Q. Did any other injury or damage occur to it before she was repaired by Mr. McKay, or was it in the same condition when it was taken to him for repair as immediately after the collision with the Rosalie?

A. No sir.

Q. My question is a double question and your answer does not cover it. I want to know whether it was in the same condition at the time you took her out to be repaired as it was immediately after the collision with the Rosalie?

A. I don't quite understand.

Q. Did anything happen to this barge between the collision with the Rosalie and the time you took her to be repaired?

A. No sir.

Q. It was in the same condition when you took her up there to be repaired that she was right after the collision.

A. Yes sir.

Q. What breakage of chains occurred, the lashings fastening the oil car on the barge and fastening the barge to the Tillicum, that was caused by this collision?

A. It broke the chains, the fore-lashings on each side eight chains, all the hooks carried away.

Q. Were these repaired by the Stimson Mill company?

A. Yes sir.

Q. Do you know what would be the reasonable value of these repairs?

A. I have no idea.

Q. I think you testified before that the forward trucks under the forward oil car dropped off into the water?

A. Yes sir.

Q. Did you ever get them?

A. No, they are out off Four Mile Rock.

Q. Before you could go on and use it, and before you could get any new trucks made and install them, what was done so that you could use the car, pending the building of new trucks to put on her?

A. I took it up the river and they transferred—took the ties out from under and put other trucks in.

Q. At the terminus of the Marysville and Northern Railway?

A. Yes sir.

Q. The company installed temporary trucks up there?

A. Yes sir.

*Cross Examination:*

Q. (Mr. Robinson). You say you lost twenty-four hours?

A. Yes sir.

Q. Why was that?

A. On account of the tide. We only have one tide to go into the river, to go over the sand bar, the flats.

Q. I take it that you had to come down here to Moran's to get the tank raised and then wait for the next tide?

A. Yes sir.

Q. And go out the next morning.

A. Yes. You see when we go in the river there is only one tide you can go over the sand bar, and if you do not get there at a certain time you cannot get into the river.

(Testimony of witness closed).

E. T. CONNELL, a witness called on behalf of the Claimant, being duly sworn, testified as follows:

Q. (Mr. Hughes). What is your business?

A. Agent of the Seattle Car and Foundry company.

Q. You are familiar with the trucks used on the oil tank cars?

A. Yes sir.

Q. Do you know the value of a set of new trucks, forward trucks, of one of these cars?

A. One set of trucks would be \$466; \$233 for one truck, two trucks being required for a car.

Q. Only the forward trucks.

A. They are both the same, as a rule, \$233.

(No cross examination).

(Testimony of witness closed).

HANS NEDERLIE, a witness called on behalf of the Claimant, being duly sworn, testified as follows:

Q. (Mr. Hughes). What is your business?

A. Carpenter.

Q. Are you a carpenter or repairer on the Marysville & Northern Railroad?

A. Yes sir.

Q. Do you remember the time when the Tillicum brought the scow with the oil tanks on it, after the collision with the Rosalie, when the forward truck was knocked off?

A. Yes sir.

Q. Was that brought up to you to be repaired?

A. Yes sir.

Q. Did you build a new set of trucks?

A. A new truck.

Q. A forward truck. Now, what was the first thing that you did in order to continue the use of the car and the barge?

A. We went down to the railroad, the logging road, and took up the car and put a temporary logging truck under it.

Q. The logging trucks were put under temporarily while you built a new truck?

A. Yes sir.

Q. What was the value or cost of doing that work, installing the temporary truck?

A. I should judge about thirty dollars.

Q. Then you built a new truck, did you?

A. Yes.

Q. And the temporary trucks were a set of logging trucks from the logging cars of the Marysville and Northern Road?

A. Yes sir.

Q. Owned by the Stimson Mill company.

A. Yes sir.

Q. About how long did you have to use these temporary trucks under this oil car before you were able to build and install a new truck?

A. The best I can remember about two months.

Q. Then, at the end of that time you had built the new trucks and installed them, did you?

A. Yes sir.

Q. Did you also repair the car for any damages done to the car?

A. Yes, there was some damage to the body of the car and we repaired it.

Q. What was the value of the cost of repairing and installing the new truck and repairing the car?

A. The best I can remember it was about thirty dollars.

Q. And the cost of building the new trucks the same as this gentleman testified to?

A. Yes sir.

Q. \$233 for building the new trucks.

A. The company built the new truck?

Q. And they would be worth \$233 as this gentleman testified?

A. I am not positive on the value of them.

*Cross Examination:*

Q. (Mr. Robinson). Mr. Nederlie, did I understand you to say that it cost thirty dollars to put in the temporary



truck and then thirty dollars again to put in another permanent one and in repairing the car?

A. I did say it cost about thirty dollars to lift up the oil tanks and put temporary trucks in.

Q. And then it cost thirty dollars another time to put the permanent truck in and repair the car?

A. That thirty was included in the repair of the body of the car. We could not do the repairing to it at the time we put the temporary truck under it; they were using the car right along, and in order not to lose the use of it, we had to let it go in the condition it was until we had a chance to put the new truck in.

Q. This second thirty dollars was when you repaired the car and finished the car up with permanent trucks. You mean to say there were two sums of thirty dollars?

A. Yes sir.

(Testimony of witness closed).

MR. MCKAY, a witness called on behalf of the Claimant, being duly sworn, testified as follows:

Q. (Mr. Hughes). Did you repair this barge that was injured at the time of this collision?

A. Yes sir.

Q. That was about the 4th of July, was it, following the collision?

A. About the latter part of August.

Q. Was it in August?

A. Yes sir.

Q. What were the injuries that you repaired?

A. The head was stove in; part of the head log, and the planking below it; one or two stanchions broke. Had to take out the planking underneath the headlog. The rug piece that goes around the end. The guard that goes fore and aft about 26 feet. Replaced that with a new piece of headlog, new plank underneath, and this new fan piece or rug piece. New stanchions, and corked one side of her all over and the end; and also for our time in hauling and launching her.

Q. You had two helpers?

A. Not all the time.

Q. Part of the time?

A. Yes sir.

Q. Who paid you for this work?

A. The Stimson Mill company.

Q. I will ask you to examine these three bills, and state whether or not they are the receipts for the work done in the repairing of this scow at the time you have mentioned.



A. Seven days \$31.50. Six days \$27. Fourteen days \$63. Yes sir.

Q. And these three bills, one for your work \$63; one for another man \$31.50 and one for another man \$27, were for the labor of repairing this scow?

A. There is part of that hauling and launching and fixing the cradle, time I put in extra.

Q. That was all necessary to do?

A. It was all necessary, and I could not do it any other way.

Q. That was paid by the Stimson Mill company?

A. Yes sir.

Q. Now who furnished the lumber you used?

A. The Stimson Mill company.

Q. Describe what lumber was furnished by the Mill company.

A. Two pieces 13x13 fifteen feet long, surfaced both sides. There was one 4x12 26 feet, surfaced one side and two edges. One piece 4x18 about 15 feet long. There was a piece, I cannot remember exactly what that piece of headlog was, but it seems to me it was about 16x14 about ten feet long. There was a piece went inside in the corner to reinforce, that was about 6x14.

Q. How long?

A. About ten feet long. There was also a faced piece went on there 4x16 twenty-six feet long. There was one bale of oakum used on her.

Q. Was that furnished by the Stimson Mill company?

A. Yes.

Q. What was that worth?

A. \$4.50. There was three sacks of cement.

Q. How much was that worth?

A. I think that was worth seventy-five cents a sack. I am not sure.

Q. Three sacks would be two dollars and a quarter.

A. Yes. There was some bolts went in there. I don't know what the price might be.

Q. Now the oakum and cement and the bolts were furnished by the Stimson Mill company?

A. Everything furnished by the Stimson Mill company. (No cross examination).

(Testimony of witness closed).

MR. H. JACOBEE, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. Hughes). What is your business?

A. I am purchasing agent for the Stimson Mill company and the Marysville and Northern Railroad company.

Q. You are acquainted with the value of lumber?

A. Yes sir.

Q. You have heard Mr. McKay describe the lumber used in repairing the scow. What was the value of that lumber?

A. It was worth about twenty-eight dollars the lumber.

Q. And the oakum and cement were of the value stated by him?

A. Yes. I think the cement was about two dollars, and the oakum was as he stated. And then there was a dollar and a half for spikes. And there were screw bolts that were worth about eighty cents.

Q. Where was the gear of the scow that was injured in this collision repaired, the chains?

A. We fixed them at the mill.

Q. Do you know what that cost?

A. About fifteen dollars to repair the chains and put new hooks in them, in the chains.

Q. The scow was taken over, as testified by captain Charlesworth, to the Moran company to have the car lifted back out of the water?

A. Yes sir.

Q. Did they render a bill for that service, the Moran company?

A. Yes sir.

Q. And the Stimson Mill company paid it?

A. Yes sir.

Q. I show you this bill and ask you if that is it, a bill for fifty dollars?

A. Yes sir, that is correct.

Q. That was paid by the Stimson Mill company.

A. Yes sir.

MR. HUGHES: If you wish we will call the Moran people and prove this bill.

MR. ROBINSON: No, we will admit it.

MR. HUGHES: I offer this bill, and those identified by Mr. McKay, in evidence.

Papers marked Claimant's exhibits 2, 3, 4, and five, filed and returned herewith.

Q. What was the value of the use of the scow and the oil car per day?

A. About fifteen dollars.

Q. The scow and the cars were owned by the Stimson Mill company?

A. Yes sir.

Q. And the value of the use of the tug Tillicum per day is how much?

A. Sixty dollars.

*Cross Examination:*

Q. (Mr. Robinson). You are the purchasing agent?

A. Yes, that is my official capacity, but I am now acting as manager.

Q. Do you know where they got this truck they put in the car?

A. Why, it was built up there at camp, at our works up there.

Q. Where did you get the wheels?

A. They were made by the Griffin Wheel company at Tacoma. We buy our wheels from there; and the rest of the stuff was built up there.

(Testimony of witness closed).

FRED MCFARLAND, a witness called on behalf of the Claimant, being duly sworn, testified as follows:

Q. (Mr. Hughes). It has been testified here that temporary trucks were installed under the oil car while new trucks were being built.

A. Yes.

Q. And that they were used about sixty days. These were the trucks of the Stimson Mill company?

A. Yes sir.

Q. What is the value of the use of these trucks?

A. A dollar a day.

Q. That would be about sixty dollars?

A. Well, it was two months; it would be fifty dollars, about; 25 or 26 days to the month.

*Cross Examination:*

Q. (Mr. Robinson). You kept extra trucks up there?

A. No, we haven't any extra, only what we use to log with. We never have had enough for it; we are short all the time.

Q. Where did you get these trucks you speak of?

A. That was one of our trucks that we used there.

Q. In logging operations you mean?

A. Yes.

Q. Did you take them out from under a logging car?

A. Yes, it was one we used for logging; used the trucks for logging.

Q. You use them separately?

A. Yes sir.

Q. Just the truck?

A. Yes, if we take one out it spoils the car. The car is worth a dollar a day. We often rent cars and that is what they pay us for rent.

(Testimony of witness closed).

Hearing adjourned.

SEATTLE, WN., *Feb. 11, 1914.*

Present: Mr. Robinson, for libelant. Mr. Hughes, for Claimant.

MATTHEW H. SANDSTROM, a witness called on behalf of the Claimant, being duly sworn, testified as follows:

Q. (Mr. Hughes). What is your business?

A. Ship carpenter.

Q. How long have you been engaged in that business?

A. Twenty-eight or twenty-nine years.

Q. Did you ever own or operate a ship yard?

A. I have, yes.

Q. In or about the city of Seattle?

A. Yes, at Ballard, at the time.

Q. When was that?

A. 1902 and 1903.

Q. Did you during that time have occasion to do any repair work on the steamship Rosalie?

A. I did.

Q. What was it?

A. I had her on the dock there for a general overhauling and I also put a piece of stem in her.

Q. Had she had a collision in which her stem was injured?

A. She had run into some driftwood or something that broke up the stem and I put in a piece of stem, false stem.

Q. At that time you put in a false stem?

A. Yes.

Q. What are the dimensions of the Rosalie?

A. The Rosalie is 160 feet long, she is ten feet deep and she is about 24 or 25 feet beam.

Q. When you say deep, that is the depth of the hold?

A. Yes.

Q. That would ordinarily, speaking in common parlance, be the depth below the water line.

A. She draws about 8 feet of water forward and about nine and a half or ten feet aft.

Q. I show you this model and ask you if you made that?

A. I did, yes.



Q. That is the model showing forward part of a steamship of the character of the *Rosalie*?

A. Yes sir.

MR. HUGHES: For the purpose of illustration I offer this model in evidence.

Model marked Claimant's exhibit "6", filed and returned herewith.

Q. I wish you would explain, so that the Court in examining the model will be able to understand what you mean by the stem of the ship?

A. Well, the stem of the ship runs from here right up to the top part of the ship.

Q. That is to say commencing at the fore-foot?

A. Commencing at the fore-foot.

Q. And running up the extreme front or bow of the ship to the top.

A. Yes sir.

Q. How, in such a vessel, and of what is the stem constructed?

A. Why, originally the stem and another piece called the apron was bolted together, and there is a rabbit cut off the plank, as you notice in there. The rabbit is cut in to retain the stem, the stem goes inside of that rabbit about two and a half or three inches, and it is fastened to this heavy piece inside there called the apron.

Q. Now the apron, then, is immediately back of the stem, is it?

A. Yes sir.

Q. Just explain the shape of that so that the Court will understand.

A. It is simply a square piece of timber put in there, in a ship of her size it would be about 14x14.

Q. And how long a timber would that be?

A. It would take on a ship of the *Rosalie*'s dimensions, it would take about 12 feet.

Q. That is, the apron would be a timber 14x14 and about 12 feet high?

A. Twelve feet high, sir.

Q. Extending from the fore-foot, which is down here at the point of the bow of the ship, up to the top?

A. Well, it does not altogether run down to the fore-foot. It runs down and counters on what is called deadwood. Runs down and connects on top of the fore-foot, so that it does not require a piece as long as the stem would be.

Q. What is the deadwood?

A. The deadwood is a piece that is put in there angle-



wise which runs—perhaps you know it is customary to put a heavy knee in there first and then the apron run on this knee to form the deadwood, if there was a knee; a piece in there angle-wise and built up of solid wood in order to fasten the frames or cants on that.

Q. Then the stem is fastened on immediately in front of this forefoot and apron?

A. Yes sir.

Q. Now, when you say you put in a false stem, what do you mean by that?

A. She was in collision or hit something and bruised up the stem just at the water line, so that I went to work and cut it down here, scarf like, about two feet.

Q. Commencing at the knee or fore-foot?

A. Not quite to the fore-foot. I left a piece in there, and trimmed it in up to the hood-ends, the end of the plank and run it above the guard, and just barked it out on there for the hood ends.

Q. Above the guard rail on the ship?

A. Above the guard rail on the ship.

Q. For the purpose of putting on a stem when it is broken would it be necessary to remove any of the planking of the side of the ship?

A. No sir, not to put on a false stem.

Q. If any part of the apron were injured or had become decayed, so that it had to be renewed, would it be necessary to take off the planking on one side in order to put in a new apron?

A. In a case of that kind it would be necessary to remove the plank at least on one side.

Q. What is the usual timber that is put in for the apron of these ships?

A. Fir.

Q. Fir timber. What is the ordinary life?

A. Oh, anywheres from 12 to 20 years.

Q. How old is the Rosalie?

A. The Rosalie was built in 1893, if I remember right.

Q. At the time you put in a false stem you did nothing to the apron?

A. I did nothing to the apron; I did not examine the apron. But it was, as far as I remember it was then in fairly good condition.

Q. Now it appears from the testimony in this case that the Rosalie came into collision with a barge being towed alongside the Tillicum, on the 8th of April, 1911, the morning of the 8th of April, 1911, during a fog. That the collision

was bow on and some injury was done to the stem or forepart of the Rosalie. At which time she was docked and a survey made by James Fowler, surveyor to Lloyd's and Frank Walker, surveyor to the owners. On demand made of the libellant, they have produced a copy of that report of the survey, which I now offer in evidence:

Paper marked Claimant's exhibit "7", filed and returned herewith.

And I show you this survey report. Have you previously had this submitted to you by me for the purpose of examination and estimate of what would be the reasonable cost of making the repairs on this vessel called for by that survey?

A. I have, yes sir.

Q. Have you made estimates of what it would cost to make all the repairs called for by that survey, in the light of your knowledge and experience as a shipbuilder?

A. I have, yes sir.

Q. You are familiar with the cost of labor and material for doing work of that kind?

A. I am.

Q. At this time in the city of Seattle?

A. Yes sir.

Q. Let me ask you first: You say that you had a dock of your own up to 1903. Since that time what have you been doing?

A. I have been working for different people. I was with Hall Brothers about two years and a half, foreman, and when I left them I went down to Grey's Harbor and was carrying on a business of my own down there.

Q. Ship building business?

A. Yes sir, and I came back to Seattle again in 1908 and I went down with Moran Company and I was foreman for them for two years.

Q. And have been in the ship building business since that time?

A. Yes sir.

Q. Where and what?

A. Why, I have been doing some work with Mr. McKay, Stimson Mill company work for them, not on my own hook. But I have worked for different people since then building barges and vessels and repairing them.

Q. You may state what would be the fair, reasonable cost of making the repairs to the steamship Rosalie in the light of your knowledge of the steamship, and based upon the specifications or calls set forth in this survey which I have submitted to you, exhibit 7?

A. To the best of my knowledge, as near as I can gather it, I have gone over it carefully, I think about \$850 would be a fair price for repairing, according to this survey for that ship.

Q. Would you be willing to undertake such a contract for making repairs called for by that survey for that sum?

A. Yes sir.

Q. I now show you libelant's exhibit B, purporting to be a statement of the bill of the Heffernan Dry Dock company dated April 29th, 1911, for repairs on the steamship Rosalie. I hand you a manifold copy of the bill submitted by libelant to us, and ask you if you have examined this manifold copy of exhibit B?

A. I have.

Q. Would it be necessary to dry dock the vessel for the purpose of making repairs that are called for by that survey?

A. It would, yes.

Q. How long would a vessel be required to be in dry dock for the purpose of making these repairs?

A. I do not think over four days. We will say five days at the extreme, but I think not over four days. Four days would repair that ship according to the survey.

Q. The charge for the first day in the dock \$63.80 and subsequent days \$50 a day, is that the usual charge for docking?

A. Yes sir.

Q. Now the next item is for labor, 42 hours blacksmithing. Under the specifications called for in this survey, what occasion would there be for such an amount of blacksmithing?

A. There would be none whatever.

Q. Well, in this survey report it calls for straightening some iron and putting it back. It states that the stem iron be repaired and refastened in place. I will first ask you what the stem iron is and how it is put on?

Q. Well the stem iron is usually a band of iron that fastens over the extreme top or end, that is bent right over the end of the stem and follows clean down until you get to the fore-foot here, which might be six or eight feet.

Q. And is on the immediate front to the fore-foot of the vessel?

A. Yes, continued from the top clear down until you get to the fore-foot, or about five or six feet.

Q. What are the dimensions of the stem iron in width and thickness?

A. It is about an inch and a half by five.

Q. Inch and a half thick by five inches wide.

A. An inch and a half thick by five until we get down to the fore-foot and then it commences to widen out and then until we get underneath here it gets to about half an inch thick and it is about eight inches wide.

Q. How is it put on?

A. Fastened on with bolts perhaps ten or twelve inches long.

Q. One or two pieces?

A. As a rule they put them in in two pieces.

Q. In what way?

A. Well, the bottom just below the rail guard of the ship, they put a scarf on there about four inches with a hole in each end and a bolt driven through the scarf. It is done for this reason, often times a ship runs into a log or driftwood and bruises up the stem and may have to take the stem off or repair it below that point. And the consequence is if we had it all in one piece we would have to take the whole thing off. For that reason it is made in two pieces, so as to take it off from the guard rail down only.

Q. Now the repairing of the stem, if it was bent or injured by this collision, would that require some blacksmithing?

A. That would require perhaps ten hours, not to exceed ten hours.

Q. I notice the next item in the bill 1636½ hours carpenters and 1465½ hours helpers. That makes in all about 3100 hours for labor. How long is a day's work?

A. Eight hours.

Q. This bill purports to show that the ship was in dock six days in all. That would make something over sixty men working there for the six days. Would that be possible?

A. It could not be possible to have that many men on there. You could not work them nohow.

Q. How many men would it require to do this work in the time that you have mentioned, four days?

A. Ten. I figure on ten men, not to exceed 12 men. I estimated I can repair that ship according to the survey with ten men in five days.

Q. What is the customary price for carpenter's wages?

A. Four dollars and a half a day on old work.

Q. And helpers get?

A. Two dollars and a half to two dollars and seventy-five cents.

Q. Would you say it would be possible to have that many hours of work done on this ship, unless something was done entirely outside of the injuries described in this survey?

A. It would have been impossible.



Q. The next item is 48 hours for caulking. What amount of calking would be required in making the repairs called for by the survey?

A. Well, I think about 24 hours.

Q. Of one man.

A. Yes sir.

Q. That would be equivalent to three days of one man.

A. Yes sir.

Q. At how much a day?

A. Five dollars.

Q. That should be done then for fifteen dollars instead of \$36 as charged here?

A. Yes sir.

Q. Now the next item is 58 pounds of sheet lead. What use would be made of that and where would it go?

A. Well, it is customary on most ships to cover the fore-foot with heavy sheet lead. Perhaps the sheet lead was tore off there and they renewed that. They might have, in order to put the stem in there, they might have had to tear that off and renew that sheet lead.

Q. 38 feet iron bark  $2\frac{1}{2}$  in. by  $4\frac{1}{2}$  in. What is iron bark?

A. It is Australian hard wood, brought in from Australia.

Q. Where could that be used in making the repairs called for by this survey?

A. I cannot see where it could be used.

Q. The next is 82 wooden wedges. What would they be used for?

A. They would be used in order to wedge off the stem, split it off temporarily.

Q. The next item 1183 feet of iron bark 1x2 inches, 35 feet long. Where would that be used?

A. One by two inches?

Q. And thirty-five feet long.

A. I cannot see where that could be used.

Q. In repairing the stem as called for by this survey?

A. No place to use it there that I can see.

Q. For what purpose is that character of iron bark used for in such a ship as this, one by two inches thirty-five feet long?

A. Well, it is hardly ever used. I do not think I ever used it myself. I do not remember anybody else ever using it, that I have worked for.

Q. If it were used about the ship, it would be in the finishing of the superstructure, would it not?

A. It would be if it were used at all, it would be for grating.



Q. Where would that be used?

A. That would be built cross-wise in that manner, about two inches apart.

Q. Crosswise of what?

A. Just built up for grating, perhaps, in the engine room and things of that sort where there are open spaces.

Q. In the interior of the ship?

A. Yes sir.

Q. But not on the bow or stem of the ship?

A. No, not on the outside; no place for it outside.

Q. Four gallons black paint, would that be used about the stem?

A. Yes, that might be used. There is a space there that is painted black. Of course a little black paint would be used all right.

Q. Now, going further down I see an item here of 96 feet of fir, No. 1 clear 8x24 inches and six feet long. What could that be used for?

A. I cannot see where that could be used. That is in odd size. I cannot see where it could be used on the stem. That is small for the apron and I cannot see for the life of me where they could use it.

Q. The next item 72 feet, No. 1 clear 12x6 12 feet long. What could that be used for?

A. That could be used. The only place I could see where they could use that would be in case they done anything above the main deck; it could have been used in there.

Q. That is in case they renewed the entire apron; they renewed only part of the apron, from the main deck up?

A. Yes.

Q. Now there is an item of 422 feet of fir No. 1, 3x12 inches, twenty feet long. That is plank, is it not.

A. That is outside planking.

Q. Outside planking of the ship.

A. Yes.

Q. There is another item of 2031 feet of fir, No. 1, 3x12 36 feet long. That is also 3 inch outside planking?

A. Yes sir.

Q. That makes in all 3453 feet of fir three inch plank. What could that be used for on this ship?

A. There was enough there to plank the entire ship.

Q. That is to say this plank is used on the outside of the ship, on the hull of the ship from the water line down to the keel?

A. Yes sir.

Q. And how much would it take to plank the whole of that ship, the hold of it from the water line to the keel, where plank of this kind is used on such a ship?

A. Well, it could be easily figured from the size of the ship. She is 160 feet long and she is ten feet deep and about 24 or 25 feet beam. It is easily figured how much planking it would take.

Q. It would not exceed 3400 feet?

A. No, I don't think so.

Q. Now the next item, 84 feet fir 6x12, 14 feet long.

A. I cannot see where he could use that timber.

Q. I find another item here of 196 iron bark 3x8 inches. What could that be used for?

A. Well, that could be used as a chafing bar on the outside of the guard rail of the ship.

Q. The guard rail of the ship is where?

A. Running from the stem clean aft, right at the line of the main deck.

Q. On each side?

A. On each side, sir.

Q. There are 175 pounds of iron one-half inch. What would that be used for?

A. I do not see what he could use that for.

Q. 600 feet timber 20x20 eighteen feet long. Where could that be used?

A. Well, that timber, it is out of proportion entirely for the size of the ship. But if they renewed the apron in there, that timber could be worked down to the size. But it would not be as large as that, and it would not be over ten or twelve feet long.

Q. There is 140 feet fir, merchantable, 10x12 fourteen feet long. Where could that be used.

A. That could be used for the stem.

Q. What is the next item, two bales of oakum. Would it require that amount of oakum to calk the ship?

A. It would not require that much oakum.

Q. Then there is 24 gallons Woolseys copper paint. What is that used for?

A. Well, if they painted the ship all over it would take approximately that much paint.

Q. All over.

A. All over the bottom.

Q. One gallon Von Hovelings paint, what is that used for?

A. I don't know what that could be used for.

Q. They have a charge here of \$240 for stem iron. Is that called for by the survey?

A. It is not.

Q. Any occasion for putting on a new stem iron?

A. I do not see where it would be when it was not called for in that survey.

Q. 72 pounds of bolts. They would be used in putting on the stem iron?

A. Yes.

Q. 430 pounds of galvanized iron. What is that used for?

A. I don't know where they could use that. They have so many items of it there I do not see where they could use all of it.

Q. Then there is 34 pounds of red lead. What would they use red lead for?

A. There was some red lead used to paint the stem iron, but it would not take over a pound. Two or three brushfuls would paint the whole thing. That is all the red lead required for that part of the work that is called for.

Q. By the survey?

A. Yes sir.

Q. So that if that amount of red lead was used there must have been more work done on the vessel than called for by the survey?

A. Yes, if they used that amount of red lead.

Q. Now the next item here, 1060 pounds of yellow metal. What is yellow metal?

A. Yellow metal is a composition metal used on the outside of the ship.

Q. That is to cover the bottom?

A. Yes sir.

Q. That is what you speak of sometimes as copper metal?

A. Yes sir.

Q. How much would be the total that would be required for making the repairs called for by this survey, if all of the yellow metal were taken off her and thrown aside and new metal put on the space of planking called for by that survey?

A. Well, according to the survey they have got a space there of thirty feet long, and measuring it up there to ten feet wide, 10x30 feet square, all that you have got to cover there, and a sheet of metal covers 4 feet by 1 foot. And 16 ounce metal that is generally used on that, a sheet would weigh a little better than four pounds.

Q. So that it would not require more than a fifth of that kind of yellow metal?

A. Not more than a fourth, of the metal that they have charged there.

Q. The amount of yellow metal would be sufficient, charged

here, to cover about two-thirds, nearly two-thirds of the part of a ship that is usually covered with yellow metal?

A. Yes sir.

*Cross Examination:*

Q. (Mr. Robinson). Mr. Sandstrom, what are you doing now?

A. At present I have been working with Mr. McKay repairing the tug Tillicum.

Q. Repairing the tug Tillicum?

A. Yes sir.

Q. How long have you worked for the Stimson Mill Company?

A. Altogether I presume I have done about two months work for them.

Q. You spoke in your evidence of having worked for them at some previous time, didn't you?

A. Yes.

Q. Did you mean to include that in the two months?

A. Yes sir.

Q. Have you made an examination of the Rosalie since 1902?

A. Yes sir.

Q. When?

A. In 1909 and also in 1910. And I had her on the dry dock when I was foreman of the Morans.

Q. Did you see the Rosalie after she was injured in this collision that we have been talking about?

A. I have seen her but I never paid much attention to her.

Q. Did not make any examination of her?

A. No sir.

Q. And no survey.

A. No sir.

Q. And you know nothing about her injuries except what you gather from the survey which has been introduced in evidence here?

A. That is all, sir.

Q. This bill that you have examined here, you are not prepared to say whether or not it is excessive, considering the items thereon, are the items an excessive charge for the work that was done according to the bill?

A. Yes sir.

Q. Perhaps you do not understand me. We will assume that this work was done on her and all these things furnished. I say are these charges excessive in there? I do not mean in relation to this accident, but suppose they had been required by the accident?



A. Well, I do not know whether there is any real charge in excess or not, sir. If everything was done according to the bill and list here, perhaps it is all right.

Q. That is what I am trying to get at. But the point of your evidence is that the stuff so charged there did not need to be done according to the survey.

A. That is the idea.

Q. You have had a good deal of experience in these matters, haven't you, of repairing vessels after accidents, etc.?

A. Yes, I have repaired lots of them.

Q. Do you know captain James Fowler?

A. Yes sir.

Q. Who is he?

A. He is surveyor for Lloyd's and the underwriters.

Q. I take it from your evidence, if the evidence would show that captain James Fowler passed this bill as one resulting from the accident, that there was an error in the survey—

MR. HUGHES: I object as calling for a conclusion and opinion of the witness.

MR. ROBINSON: I will withdraw the question.

*Redirect Examination:*

Q. (Mr. Hughes). Mr. Sandstrom, you are now engaged in the work of repairing the tug Tillicum, you say?

A. Yes sir.

Q. That is repairing due to the fact that the Tillicum recently encountered an obstruction in Shilshole bay, where work for the Great Northern had been done, and she was sunk, is that it?

A. No, that was another vessel, the La Paloma.

Q. You are doing work on the Tillicum?

A. Yes sir.

Q. Along with Mr. McKay?

A. Yes sir.

Q. At Mr. McKay's dry dock?

A. No sir. Doing it at the Stimsons. Just repairing a guard, doing it between times while she is lying at the dock.

Q. Then you are working with Mr. McKay under contract for repairing the Tillicum, is that it?

A. Not contract. I am working there, we worked yesterday. And perhaps I will not work there again for two or three days. Depends when she comes in, and then they go down there and do a little work when she is in.

(Testimony of witness closed.)



ANDREW M. MCKAY, recalled on behalf of the claimant, testified as follows:

Q. (Mr. Hughes). You formerly testified in this case as to the damages to the scow injured in this collision with the *Rosalie*?

A. Yes sir.

Q. You did some repair work on the scow?

A. Yes sir.

Q. Mr. McKay, you are engaged in the shipbuilding business?

A. Yes sir.

Q. At Ballard.

A. Yes sir.

Q. You have a dry dock of your own there?

A. An interest, a third interest.

Q. With whom?

A. Jacobson and Erickson.

Q. What is the name of your concern?

A. The Golden Garden Ship Yard.

Q. How long have you been in the shipbuilding business?

A. Twenty-four years.

Q. How long have you been engaged in that business at Ballard?

A. About nineteen months.

Q. And where prior to that time?

A. Greater part of the time with the Stimson Mill company.

Q. Have you built many vessels?

A. No sir.

Q. You have done repairing of vessels?

A. Yes, repairing. I have built small boats, forty or fifty feet long.

Q. Have you examined this survey, exhibit No. 7.

A. Yes sir.

Q. Have you inspected that survey and made an estimate for the purpose of determining what would be the reasonable cost for making the repairs called for by that survey?

A. Yes sir.

Q. Are you acquainted with the cost of labor and materials in doing that class of work in this port?

A. Yes sir.

Q. Were you in 1911?

A. Yes sir.

Q. Now what would be the fair, reasonable cost of making all the repairs to the *Rosalie* called for by this survey exhibit No. 7?

A. About \$850.

Q. Would you be willing to undertake to do the work upon her today for that sum of money?

A. Yes sir.

Q. A bill has been rendered, an itemized bill, introduced in behalf of the libelant in this case, of which I show you a manifold copy, and ask you if you have examined that before?

A. Yes sir.

Q. Would it be necessary to put the Rosalie in dry dock in order to make the repairs called for by that survey?

A. Yes sir.

Q. How long would it be necessary for her to be in the dock in order to make these repairs?

A. About four days.

Q. How many men could be successfully and advantageously employed in making these repairs during that period of time?

A. Not any more than 10 or 12.

Q. There is an item here, a charge for 42 hours blacksmithing work. Would that be required to do the work called for by this survey?

A. The only blacksmith work that I know could be done on that is them bolts that fasten on that stem iron.

Q. The straightening of the stem would require some?

A. Yes sir.

Q. How many hours blacksmith work, would you say in all, might be required to do the work called for by this survey?

A. Oh, about 12 hours.

Q. Now there is an item of 1638½ hours for carpenters and 1465½ hours for helpers. Could that amount of men be employed doing the work called for by that survey?

A. No sir.

Q. Would it be possible to work them on that vessel in doing the work they have called for by that survey?

A. No sir.

Q. There is an item of 48 hours calking. How much calking would be required to do the work called for by that survey?

A. About three days.

Q. Of one man.

A. Yes.

Q. At eight hours a day?

A. Yes.

Q. There is an item of 58 pounds of sheet lead. What could that be used for, or would it be required under this survey?

A. They would use some of it. I don't know how many pounds it would take to cover the fore-foot. They would want some sheet lead to cover the fore-foot.

Q. There is an item of 38 feet of iron bark  $2\frac{1}{2}$  by  $4\frac{1}{2}$ . What could that be used for under this survey?

A. I do not know what it could be used for.

Q. Would iron bark of that dimension be required for any repairs to the stem or apron called for by the survey?

A. No sir.

Q. There is another item here of 1183 feet iron bark 1x2 inches, 35 feet long. Where could that be used on a vessel of that kind?

A. I don't know.

Q. Could it be used about the repair of the stem for injuries such as are described in that survey?

A. No sir.

Q. That iron bark is narrow strips of hard wood one inch thick and two inches wide and 35 feet long, commonly used for grating purposes?

A. Yes sir.

Q. And that would be in the hold or interior portions of the ship?

A. Yes, stepping, etc.

Q. Four gallons of black paint called for in this bill. How much black paint would be required for such repair as called for by the survey?

A. A gallon of paint covers 200 feet on an average, and it would be 10x30.

Q. That would take about a gallon and a half of paint?

A. Yes sir.

Q. There is a gallon of white paint. Could that be used?

A. Yes sir.

Q. There is 30 feet of ceiling 1x3 inches, what could that be used for?

A. 1x3?

Q. Yes.

A. That might be used up on top of the house.

Q. That would not be for repairs caused by such a collision as this would it?

A. It might be on top where the house comes, there might be some little pieces where they might have to put in a few short pieces.

Q. At the top just back of the stem?

A. Yes, above the main body, there might be a few pieces broke off.

Q. There is an item of 96 feet of fir No. 1 clear, 8x24 and

six feet long. Could that be used in making the repairs called for by this survey, if so, where?

A. 8x24. No, I don't know where that could be used.

Q. The next item is 72 feet of fir, No. 1 clear, 12x6 inches and 12 feet long. Could that be used and if so where?

A. They might use that part of it for that apron inside, above the main body, above the hull, away up inside.

Q. That is what you assume that instead of repairing the whole apron they repaired only a part of the apron from the deck up?

A. Yes, they might use that.

Q. The next item is 256 feet of fir, No. 1 clear, 8x24, 16 feet long.

A. I don't know where that could be used.

Q. Then there is an item of 1422 feet of fir No. 1, 3x12 inches, twenty feet long. Another item of 2031 feet of fir No. 1, 3x12, thirty feet long. That is three inch planking?

A. Yes sir.

Q. Of lengths of 20 and 30 feet.

A. Yes sir.

Q. Is that the class of planking used to cover the bottom of the ship?

A. Yes sir.

Q. Could that possibly be used in making such repairs as are called for by that survey?

A. No sir.

Q. How much of it, what part of it would require that class of deck planking, if they made such repairs as are called for by this survey, I don't mean deck planking but planking?

A. It would not take near a quarter of it.

Q. Would that be enough to cover the entire bottom of the ship?

A. Well, I could not say that, it would cover a good part of it, but I could not say whether it would cover it all or not.

Q. If the ship is 160 feet long and 10 feet depth, that, on the two sides would take something over 3200 feet to cover the whole outside of the hold, would it not?

A. Yes.

Q. So that this would be enough to practically cover the entire bottom of the ship, would it not?

A. Yes sir.

Q. And there is 84 feet of fir, No. 1, 6x12, fourteen feet long. Where if at all could that be used in making the repairs called for by this survey?

A. I do not know.



Q. Another item of 196 feet of iron bark 3x8. Where could that be used?

A. They could use that for a chafing piece on the guards.

Q. Forward?

A. Yes. Only a little, you know. They could use part of it for guards, 3x8 for a chafing piece on the outside of the guard.

Q. The guard is what we speak about as the guard rail of the ship?

A. Yes.

Q. Then there is an item of 175 pounds of half inch iron. What could that be used for, if at all, in making these repairs. What is half inch iron used for?

A. Too small for a vessel that size, cannot use it. I do not see what you could use it for for that sized vessel.

Q. If they did put it on for the repairs in that part of the ship called for by the survey?

A. I don't see what they could use it for.

Q. Now there is 600 feet of timber 20x20 inches 18 feet long. What could that be used for?

A. Well, they might use part of it for the apron; there is a lot of work to do inside, they might use a part of it. But it would not be over six or eight feet long. They might use a part of it.

Q. There is 140 feet of fir, merchantable, 10x12 inches, 14 feet long.

A. That would be used for a false stem.

Q. And there are 2 rolls of felt and 2 bales of oakum, that would be used for what?

A. That felt is put on with the yellow metal. The two bales of oakum is used for calking.

Q. And if no more was done than is called for by this survey would it require that amount of felt? and oakum?

A. No. It would not take two bales of oakum for the amount of labor that is attached to it.

Q. And then there is the rubber paint. Would that be sufficient to paint the whole bottom of the ship?

A. Yes.

Q. And there is a stem iron \$240 charged for it. Was there any necessity of putting on an entirely new stem iron under the specifications in this survey?

A. No sir.

Q. Would such a stem iron cost \$240, even if it were used?

A. To put on that repair?

Q. No—

A. You mean on this survey?



Q. Just answer that question.

A. No sir, it could not possibly cost that much.

Q. 72 pounds of C. S. bolts, what is that?

A. I don't know.

Q. 450 pounds of galvanized iron. Where could that be used in making such repairs as are called for by the survey?

A. It don't specify the size of it. There could be part of that used for drift bolts.

Q. Then fittings. It is not specified what.

A. No.

Q. What is covered by the term "fittings"?

A. I don't know.

Q. 34 pounds of red lead. What would that be used for, if at all?

A. Could not be used on that except a pound, might use a pound or two pounds. It would not take any more than a pound, that would cover the stem iron. They always cover the iron with red lead to protect that stem iron. They put red lead on it. They don't use copper paint.

Q. So if that amount of red lead was used it was used elsewhere on the boat?

A. Yes sir.

Q. And 450 pounds of galvanized spikes, could they be used about the repair of the stem under these specifications set forth in the survey?

A. Not so much.

Q. About how much would be?

A. About a quarter of that.

Q. Then there is 1060 pounds of yellow metal. That is what is spoken of as copper plate, copper metal, is it?

A. It is termed metal, it is a composition.

Q. That is just to cover the bottom of the boat, is it?

A. Yes sir.

Q. That would be enough to cover nearly two-thirds of the bottom of this ship, would it not?

A. Yes sir.

Q. It appears from a former survey that has been furnished me by the libelant, that some time about 10 months before there was an injury to the stern of the ship, an injury which damaged the propeller, at which time also some of the copper plates were torn off from the stern, and about 60 yellow metal plates put on. Would that, together with the 1060 pounds here spoken of be practically sufficient to cover or recover the whole bottom of the ship?

A. I have not figured it out, but it would be pretty close to it.

Q. Yellow metal nails are used in putting on the yellow metal?

A. Yes, putting on these sheets.

*Cross Examination:*

Q. (Mr. Robinson). Are you in the shipbuilding business now?

A. I am, repairing.

Q. How extensive a plant have you got out there? Have you got a dry dock?

A. No. I have marine ways, roller ways.

Q. And your experience has been largely with boats smaller than the *Rosalie*, I take it?

A. Oh no. I repaired the schooner *Stimson*; *Globe* Navigation boats; four masted schooners, and also the tug *Stimson*.

Q. You repaired the barge, too, that was in this same collision?

A. Yes sir.

Q. You are working on the *Tillicum* now?

A. Yes.

Q. You did not see the *Rosalie* after this accident?

A. No sir.

Q. The testimony you have been giving here is entirely based upon the survey and not upon actual knowledge of the job?

A. Yes, on the survey.

Q. Now, calling your attention to this bill that you have been using. For instance, there is 600 22x18. What does that "600" mean?

A. Feet.

Q. Board measure.

A. Yes.

Q. And the 1422 fir, which you have testified about, the 3x12 and 20 feet long and the 2031 fir, that is board measure?

A. Yes sir.

Q. Then you do not have an even square, you have to divide by three to cover the whole bottom, do you not?

A. Yes.

(Witness excused.)

Recess taken until 2 p. m.

*Afternoon Session*

Present: Mr. Robinson, for the libelant. Mr. Hughes, for the claimant.

JOHN L. HUBBARD, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. Hughes). Your full name?

A. John L. Hubbard.

Q. What is your business, Mr. Hubbard.

A. Manager of Hall Brothers Ship Yard.

Q. You are a shipbuilder by trade?

A. Yes sir.

Q. How long have you followed that business?

A. Since I was 18 years of age. I am now forty-eight.

Q. How long have you been manager of Hall Brothers Shipbuilding Yard?

A. Eleven years.

Q. Your business there is repairing ships, is it not?

A. Yes sir.

Q. Are you acquainted with the Rosalie?

A. To some extent.

Q. I have asked you to examine the report of a survey of injuries to the steamship Rosalie, which occurred on the 8th of April, 1911, in collision with a scow being towed by the tug Tillicum. The report was made by James Fowler and by Frank Walker, as surveyors. You have made an examination of the report for the purpose of determining what would be the reasonable cost of making the repairs called for by that survey?

A. Yes, I have looked that over.

Q. Have you made your figures and estimates as to the cost of material and labor and all the elements that go to make up the cost of a repair of a vessel according to that survey?

A. I have.

Q. I wish you would state, first, what would be the maximum cost that could reasonably be incurred for making the repairs called for by that survey?

A. \$1050.

Q. What do you estimate would be the ordinary, reasonable cost, estimating the amount of labor to be such as would naturally be anticipated from this survey?

A. Well, that is assuming in this maximum figure that I have given here, I have given the outside cost, that is what you mean, is it?

Q. Yes. Now I ask you, what would be the reasonable and probable expense of making that repair according to that survey?

A. Well, I will state that in making this estimate here, I calculated on the basis of a given number of men so many days, and in that estimate of labor I have made a very liberal

allowance, although I think it could be cut down one-third, probably.

Q. That would reduce it how much?

A. Well, the total that I have allowed for labor here amounts to about \$560. Cutting that down one-third would make it about \$400 to \$425 the cost of the labor.

Q. How long would the ship have to be in the dock?

A. Five or six days; six days at the outside

Q. Well, did you figure in your outside figure how many men you would have employed for that period of time?

A. As I stated, 18 men I had calculated on, but I believe it could be done by twelve.

Q. And not to exceed five or six days.

A. Yes sir.

Q. In which event the expense would be about \$900.

A. \$900 to \$950, somewhere now.

Q. Would you be willing to undertake to do the work in accordance with this survey for that sum?

A. I certainly would for \$1050, my maximum estimate.

Q. Well, you think you could do it for \$1050?

A. Well, if I thought there was close competition in the bids for the work, if bids were being asked for, I probably would bid in the neighborhood of \$900 to \$950, if I was anxious to get the job.

Q. Now that would be allowing for removing the planking on one side for the purpose of installing the new stem and apron?

A. Yes, in accordance with the recommendations in that survey.

Q. Could that work be done without removing the planking?

A. I have frequently renewed stems and aprons without doing it.

Q. That would diminish the expense very materially, would it not?

A. Indeed it would.

Q. And it would be unnecessary to put on new planking or new copper or metal plating?

A. That would eliminate the necessity for that, only a limited amount around the stem where the fastening would go in the stem and apron, the copper sheathing would have to be removed.

Q. How do you repair a vessel by putting a new stem and apron in without moving the planking, explain that?

A. Why, I usually split out the wood by bering it off in short sections and splitting it out with split bars. We could



do that and remove it and then take jack screws or some means of spreading the planking apart to allow a little more room than exists, until the timber can be dropped down in place. You understand the stem has what we call a rabbit and the plank, the narrowest point is at the extreme forward end and increases in width as it goes aft. Well, that will not permit the stem to be slipped back in from forward owing to the planking narrowing up there at the forward part of this rabbit. If we can spread it open with jack screws sufficiently, why we can slip that in there until the large part is past the narrowest part in the plank, and let go our jack screws or whatever means we have used there to spread the plank and let them spring back into the rabbit, in place. That is often done. And then again, we have done the job by putting up a gin pawl and lifting the stem up and lowering it down so that the large part would enter back of the rabbit. I could make a sketch of that and give you a better idea of the point I am trying to make. For instance, the stem is made of 12 inch timber. Well, the aft part of that stem would be 12 inches wide, and where the plank would end on the stem, possibly it would not be over seven or eight, and that is where it is put up against the stem and we put on what is called a rabbit to give a corking seam there, and so that makes a V shape impression on each side of the stem that the plank fits into. Well now, you can drop that in from above, allowing this large part of the stem to come to the natural position, and drop it down from above. That can be done but the most practical method is to use a jack screw and spread the planks apart and shove it right in from forward.

Q. According to this survey, would there be any necessity for putting on a new stem iron?

A. I would think so, if there was sufficient damage there to damage the stem, it would damage the stem iron.

Q. The report suggests simply the repairing and refastening of the stem iron.

A. Probably bent up, I would not think broken. I would think probably badly bent, and it would be necessary to take that to the forge and straighten it out and get it to shape again, and then fasten it back on the new stem.

Q. In that case no new stem would be necessary?

A. No sir.

Q. What would be the reasonable expense of shaping it up again, forging it up?

A. Oh, I would think twenty-five dollars would be the maximum.

Q. Notwithstanding the report of the survey, that the



stem iron be repaired and fastened, the libellant has introduced a bill in evidence showing a charge of \$240 for a stem iron. Would that be a reasonable charge for a stem iron for such a vessel?

A. That would be an excessive charge.

Q. And what would be a reasonable charge?

A. Fifty dollars.

Q. There is a charge here for 1060 pounds of yellow metal. Is that a reasonable amount of yellow metal to be required for making repairs called for by this survey?

A. It is a very excessive amount.

Q. And there is 231 pounds of yellow metal nails. The same would be true as to that.

A. Well, that would correspond to the amount of metal given there. They would average one pound per sheet, that is the ordinary allowance for nailing on the sheets.

Q. If the plank were removed on one side for the purpose of putting in a new stem and apron, how is that done if they do not pry that open as you describe?

A. Got to split them off back to the butts or make new butts.

Q. Now, I want you to explain how these are put on, that is whether they are put on so as to stagger across?

A. Well, when the vessel was built the keel would be laid and then the frames set up, and then the vessel ceiled on the inside with timbers. Some of them are entirely ceiled up inside and some are not. Some are left open for space to allow air to the frames. After that is done they begin at the bottom down against the keel, and there is a rabbiting inside next the keel similar to the one extending around the stem, which gives a square edge for the first plank to butt against to form a calking seam, so that they can be made water tight. That first strake is called the garboard strake, that is put on a vessel like the *Rosalie*. I would think it would be 14 inches wide and three inches thick, and that is fastened on with spikes. And on larger vessels, I do not think it is on the *Rosalie*, but on larger vessels they use lugs, treenails, these lugs or pins are driven through the wood on the outside and wedged on the inner end, on the inside of the ceiling, to keep the pin from pulling out—or treenail. Then the next course is put on right abutting against that until they reach the height the vessel is planked. Now a vessel like the *Rosalie* you would have about 18 strakes of plank from the keel up to the deck line, that is as far as you would plank her.

Q. What I want to get at is whether these planks are the same length as are used in planking the vessel?

A. Yes, they vary in lengths. They usually stagger the

butts, you know, so that there don't two planks butt on the same frame; they have several planks between.

Q. And these planks would vary in length from 10 to 30 feet?

A. Yes sir.

Q. One plank would come back to a certain butt, say 10 feet?

A. The next one probably would come 12 feet, to the next frame or two frames from that, 14 feet. Probably the next one about 18 feet, and then they might stagger back again and get one at 12 feet, and zig zag back that way, so as to allow about three frames between the butts.

Q. So that if you were to take off the plank on the starboard side, any of them, you would only take off the length of a plank, whatever it was?

A. One length of plank.

Q. And some plank taken off would be 10 feet and some 12 and some 14 or 16, etc.

A. Yes sir.

Q. The first length of plank next the stem is all that would be taken off?

A. Yes, what we call the fore-hoods, the hood ends.

Q. About what amount of timber, if you had to take off the plank on the starboard side, about how much would have to be removed and replanked, what amount of new plank?

A. To remove the stem I do not think any would be necessary.

Q. Suppose you had to remove the apron?

A. Well, I do not think it would be necessary to remove the plank; it could be installed without removing.

Q. If that were done, then it would not be required to put any new planking. The amount of planking called for in this bill would not be required?

A. No. From the survey there it says plank on one side to be renewed. That would indicate that there must be some damage to that plank.

Q. The survey, however, does not say there was any planking but simply around the stem and apron.

A. Well, in this estimate here that I have given you, I have based it on the assumption that the first length from the bow on one side all planking would have to be renewed. That is embodied in this figure that I gave you of \$1050.

Q. Suppose a new stem were put in. What size of stem and what kind of timber would be used for it?

A. I think the stem of that vessel would probably be 10x16,

something like that. And it would be in the neighborhood of 16 feet long.

Q. Now how about the apron? The apron is back of the stem?

A. The apron would be a larger timber than that, as the vessel widens out going aft, it would take a wider piece of timber aft.

Q. It is smaller at the forward side.

A. With the stem ten inches, that timber would side probably 14 inches. I would say it would be 14x16 would be an extremely heavy apron for that vessel.

Q. And if the full stem were put in, the full apron would be renewed.

A. Why, not any longer than the stem, not as long, quite. 16 feet—well it would not be that long, it only reached to the main deck, and the apron would not be to exceed 12 feet.

Q. And these stems and aprons are usually fir?

A. Yes sir.

Q. About what would be the ordinary life of the wood?

A. Oh, about 12 or 14 years.

Q. Now there is nothing to indicate in this survey whether the apron was required to be renewed because of its age. If the vessel had been in use at that time for 15 or 18 years, and the repair of the stem being made, would it be necessary to put a new apron in on account of the age of the apron?

A. They very probably would find decayed wood in there.

Q. A collision with the bow of a vessel that would damage the stem and the apron both, would be sufficient to cut the ship down so that she could not get ashore, would it not?

A. Well, it would be very apt to cause serious leakage forward there. Probably could be controlled by pumps; though a wooden vessel would swamp up so that they do not leak a great volume of water.

Q. It would take a very unusual collision to break the apron?

A. It would take a very heavy collision to damage the stem and apron both. If the apron was damaged in the collision I would say that it would damage the planking also, and that would account for this recommendation regarding the planking.

Q. A collision in which both vessels were practically stopped in the water before the collision took place, or nearly so, one being merely a scow and the other boat like the *Rosalie*, would that be likely to be heavy enough collision to break the apron, if the apron were sound?

A. I do not think so.

Q. There is a charge of 1183 feet iron bark 1x2 inch 35 feet long. Would that be used in making such repairs as are called for by this survey, or as would arise from such a collision?

A. I cannot see any place where it could be used. Nothing to indicate that the vessel is sheathed with iron bark and from the yellow metal sheaths there noted would indicate she was sheathed with yellow metal; and if she was not, she would not be sheathed with iron bark. And in cases where iron bark sheathing is used it is usually where vessels ply in icy waters, and I do not think the *Rosalie* has any.

*Cross Examination:*

Q. (Mr. Robinson). In making this estimate here for labor how much profit did you allow for yourself?

A. Why, about the usual amount, we figure about 11%.

Q. About eleven per cent.

A. Yes, for overhead charges.

Q. Mr. Hubbard, did you see the *Rosalie* after she was in this collision?

A. I did not.

Q. You base all your testimony upon that survey there?

A. Yes sir.

Q. Was that survey specific enough for you to make an estimate on this matter?

A. I think so yes sir, from my knowledge of other vessels and the general knowledge of this vessel. I have seen her a number of times. I think I have had her in the dry dock.

Q. Mr. Hubbard, is it not often a matter within your own experience, that when you come to do work of this kind especially when you have not examined the vessel, that matters turn up that you have not anticipated?

A. Yes, that is true.

Q. Mr. Hubbard, if it should be a matter of evidence here that this survey was made after the collision, the survey which you have seen, and that subsequently this bill which you have also seen I think, for \$3385.32 was presented as showing repairs made under the survey and approved by the surveyor and the Insurance company and settled on that basis, would you say that there has been a gross mistake somewhere?

MR. HUGHES: I object as incompetent.

A. Well, the bill looks entirely out of keeping with the recommendations in the survey.

Q. I do not suppose you have been shown the report of the surveyors, after the repairs were made? You have not seen that, have you?



A. No, I have not.

Q. (Mr. Hughes). This purports to contain it, Mr. Hubbard, the last part of it.

A. I beg to retract that statement. I have read this.

Q. (Mr. Robinson). Now you take that bill again, Mr. Hubbard, and look at the heading there before the items. Is that substantially the heading describing the recommendations made in the survey?

MR. HUGHES: I object as not the best evidence and calling for a conclusion.

MR. ROBINSON: The witness testified to it and I wondered if he considered it in the same way.

Q. I will change the question. Just look at the bill and see whether the heading purports to describe the recommendations made in the survey?

MR. HUGHES: I renew my objection.

A. Apparently it corresponds to the recommendations here. There are a number of items mentioned here that would be contingent upon this work being done, that is specially enumerated here in the bill that are not in the recommendations. Such as corking seams and butts, which would be necessary if the plank is put on.

Q. That is a common thing, is it not?

A. Yes sir.

Q. You have seen a good many of these and done work under these surveys haven't you?

A. Yes sir.

Q. And there are a lot of things required in that survey that are not specially mentioned?

A. Yes sir. Yes, they say you have to put on a piece of plank; they do not say that you have to drive spikes or bolts and calk the seams, but that follows, that must be done to make a finished job.

*Redirect Examination:*

Q. (Mr. Hughes). Mr. Hubbard, if a survey were made upon the basis on which you took the contract to make repairs on a vessel, and in attempting to make the repairs there appeared more extensive injuries to the vessel, or other repairs were found to be needed than those covered by the survey, would not a new survey be called for before you were authorized to go a head under your contract.

A. As a rule the surveyors would be called and would authorize the extra work done there. The contractor usually would be anxious to get an extra, if there was any extra work showed up so there would be extra compensation for it.



Q. You have been asked about this bill being passed upon by the surveyor. Within your knowledge and experience in dealing with companies, like the libelant in this case, do you know whether or not it ever occurs that the practice is ever adopted by this company or other like companies, to wait for their annual docking until they have some accident, and then work the annual overhauling of the ship into the repairs on account of and charge to the injury?

A. I do not think I could say that. I can say this, though, that where vessels have been injured in collision or something of that kind near the time that they would be due for their annual overhauling, that they would take advantage of that time and do their annual overhauling when these repairs were made, to avoid the expense of that later on, which is good business, for that matter for any one to take advantage of.

Q. (Mr. Robinson). Mr. Hubbard, you say that if additional work was done that would require another survey?

A. Yes, well, not what you would call a survey. As a rule these matters are left to the supervision of the surveyors, and he would simply call their attention to it and they would authorize more work, if necessary. It would not be a formal survey.

Q. Do you mean that a surveyor for an Insurance company would authorize more work and still charge it to the accident?

A. Well, I don't know where he would charge it. If he saw that the work was necessary, he would be as anxious to have it performed as the contractor of the job would be to perform the work. They would want to see the vessel thoroughly repaired.

Q. That is the Insurance company would want to.

A. An inspector in charge for either the owners or the Insurance company. If they are just men they would not want the vessel half repaired.

Q. Now you have testified at length about this matter. Would you say then, having regard to this whole thing, the testimony you have given, if the insurance company paid for this accident on the basis of the bill that you have been testifying about, they paid for more than they should have.

A. Yes sir.

(Witness excused).

CHARLES REDMOND, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. Hughes). What is your name?

A. Charles Redmond.

Q. You were subpoenaed to come here just now?

A. Yes sir.

Q. And came up in answer to that subpoena served by the Marshal?

A. Yes sir.

Q. What is your business, Mr. Redmond?

A. Ship carpenter.

Q. How long have you been a ship carpenter?

A. Oh about 26 or 27 years.

Q. Were you working for the Heffernan Dry Dock company in April 1911?

A. Yes sir.

Q. Were you one of the workmen engaged in repairing the *Rosalie* when she was in the Heffernan Dry Dock in April, 1911, after her collision with the *Tillicum*?

A. Yes sir.

Q. Will you tell what repairs were made upon her at that time.

A. Well, as near as I can recollect, we put a new stem on her, which was a hard wood stem, iron bark, as they call it. Iron bark stem. There were two pieces of guard about 14 or 15 feet long, somewheres there, as near as I can recollect.

Q. Iron bark guard?

A. I do not remember whether iron bark or not. I think probably the outside piece was iron bark. As a general rule it is. And then there was a little piece of apron put in on the inside from the main deck up to the head of the stem, six inch stuff there. And then there were little minor repairs inside there, what we had to tear out to get at it, some little fitting of boards and things like that.

Q. Any plank taken off of her?

A. Not to my recollection there was not.

Q. Was there any of the yellow metal taken off in making these repairs?

A. Well, that I do not remember whether there was any taken off or not. I could not say for sure.

Q. Do you remember whether they put on a new stem iron or put the old one on?

A. No, I cannot remember whether the old one was put on or whether a new one was put on. I could not say. I could not say for sure whether the old one was used or the new one.

Q. What you describe is substantially all the repairs made at that time?

A. That is all the repairs I can remember, but just a few minor repairs that you always have to fix up, you know, after the stem goes on, of course.

Q. Do you remember whether there was any other part of the ship repaired at that time?

A. No, not to my knowledge.

*Cross Examination:*

Q. (Mr. Robinson). Who was foreman in charge of that ship, do you remember, in charge of the work?

A. Hollywood.

Q. Was Simon on the job? He was superintendent at that time, was he not.

A. He was superintendent but he never was around there very much. He might come down there in the morning and go away.

Q. He came and saw the work occasionally?

A. He was naturally supposed to. I could not tell. He might be down and I not see him.

Q. Was Hollywood on the job all the time?

A. Yes sir.

(Witness excused).

CHARLES MARTIN, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. Hughes). What is your business?

A. Ship carpenter.

Q. You were just subpoenaed by the Marshal and brought up here to testify?

A. Yes sir.

Q. You are working where now?

A. Down at the Alaska steamship.

Q. In repairing what vessel?

A. The Alameda.

Q. And you are working along with Redmond are you, on that job?

A. Yes sir.

Q. How long have you been a ship carpenter?

A. About 27 years.

Q. Where were you working in April, 1911, and for whom?

A. Down in the Dry Dock.

Q. In Heffernan's dry dock.

A. Yes sir.

Q. Are you one of the men engaged in repairing the Rosalie when she was in the Heffernan dry dock in April 1911?

A. Yes sir.

Q. Will you tell what repairs were made on the Rosalie at that time?

A. Yes. The only thing I can remember, we took off the old stem and put on a new one.

Q. What kind of a stem did you put in?

A. Iron bark stem; and put on a guard, an iron bark guard and an apron from the deck up.

Q. That is what they call the apron, the timber used behind the stem?

A. Yes. Used for hood ends to fasten to the stem, to fasten to.

Q. About what was the size of that timber, about, from the deck up, just behind the stem?

A. I don't remember.

Q. That would be a continuation of the apron up to the top.

A. Sure, yes sir.

Q. Now that is all you remember being done at that time?

A. Yes, and all the lockers and things inside that had to be fixed up after we got the stem in, and the rails we put on top of the deck.

Q. That is in the forward part.

A. Yes sir.

Q. Now that was all, was it?

A. That is all I remember.

(Witness excused).

Hearing adjourned.

SEATTLE, WASHINGTON, *July 3, 1914.*

Present: Mr. Robinson, for the libelant. Mr. Hughes, for the claimant.

DAVID HOLLEYWOOD, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. Robinson). What is your business, Mr. Hollywood?

A. Superintendent.

Q. Who for at present?

A. Seattle Construction company.

Q. In April 1911 who were you working for?

A. Heffernan Dry Dock company.

Q. Do you remember, Mr. Hollywood, of repairs being made on the steamship *Rosalie*, in April 1911, as a result of a collision?

A. Yes sir.

Q. Showing you libelant's exhibit "B", Mr. Hollywood, have you ever seen that bill before?

A. Yes sir, I have seen it.



Q. Were you foreman of the crew that worked on that boat?

A. Yes sir.

Q. Mr. Hollywood, I will ask you if you remember what that item of 58# sheet lead was used for?

A. Yes, that is the chafing piece on the vessel's forefoot, at the end of the vessel's stem.

Q. What was the general nature of the repairs?

A. When she came on the dock her stem was knocked in, her apron piece was burst, her breast hooks were gone; the deadwood from the forefoot was started, and the quickwork on top of the guard was gone, and the timber ends or wood ends along on the starboard side all the plank was gone or started.

Q. Mr. Hollywood, this bill contains among other items 38 feet iron bark  $2\frac{1}{2} \times 4\frac{1}{2}$  inch, and 1183 feet iron bark  $1 \times 2$  inches and thirty-five feet long. What was that stuff used for?

A. That first item of iron bark was the rail on top of her quick work and is composed of one piece  $2 \times 4$  and the iron bark chafing strips are nosed over it to make it look like a rail; it is rounded over on each side and fastened to the  $2 \times 4$ .

Q. The rail above the ship's deck?

A. Yes.

Q. Part of that was carried away.

A. That finishes into the stem whatever was stripped. When the stem came off it takes part of the rail on both sides.

Q. This second item of 1183 ft. of iron bark  $1 \times 2$ , what was that used for?

A. That was for chafing on the vessel's hull about the water line.

Q. Was any of that stuff used for making gratings or any interior work or furnishings for the vessel?

A. No.

Q. Now here is an item of 96 feet fir 8 in. by 24 in., 6 ft. Can you recollect what that was used for? I will read you three items here of timbers: 96 ft. 8 in. by 24 in., 6 ft.; 72 ft. 12 in. by 6 in., 12 ft.; 256 ft. 8 in. by 24 in., 16 ft.?

A. That  $8 \times 24$ , 16 is for the apron. That  $8 \times 12$  would be used for breast hooks and the  $12 \times 6$  would be used for strakes, when the apron is gone the column underneath the deckbeams was carried away and that had to be renewed on each side.



Q. Now, among other things this bill contains an item of 24 gallons Woolseys copper paint.

A. Yes.

Q. What was that used for?

A. Painting the vessel's hull.

Q. How much of it did you paint?

A. Well, all her hull was painted.

Q. Why was that?

A. Because in hulls of vessels, as soon as you take a vessel out of the water, after being painted, the paint is no longer any good; it has lost its virtue altogether.

Q. You mean that exposure to the air has affected it?

A. Yes sir. It is always the case on a job when a vessel is taken out you have to paint her hull.

Q. Now there is an item here of 430 lbs. galvanized iron fittings; what was that used for?

A. Galvanized iron fittings?

Q. Yes.

A. There are knees in back of the rail, stanchions, and there are the knees, iron knees back of the breast hooks, and then of course all the fastenings were galvanized.

Q. There is an item here of 34 lbs. red lead. What was the red lead used for?

A. Well, that would be used in the top of the deadwood, wherever you put two pieces together that are going to be closed in or where you cannot get at them, it is always good practice to cover it with some kind of paint to take care of it, and we generally use red lead paint.

Q. 1060 lbs. yellow metal. What was that used for?

A. Sheathing.

Q. How much of the ship did you sheath with that?

A. Well, her strakes, if I remember right, were about forty feet—her planking was somewhere about forty feet long, so in stripping the starboard side to get the apron on, you have to go back to the original butts, that would be forty feet of the ship from her keelline up to the top of the ship line that you would have to sheath altogether.

Q. You saw this ship, of course, when she first came into the dry dock?

A. Yes sir.

Q. Did you use more yellow metal on her than was necessary to repair the forward part of the ship?

A. No, absolutely not.

Q. 231 lbs. yellow metal nails, were they necessary to put on this yellow metal?

A. Yes sir.

Q. Was there any part of the upper works back of the stem that had to be repaired?

A. Yes sir.

Q. What had to be done in that?

A. The upper deck was started and her main deck was started back to the forward hatch.

Q. Were there any interior fittings between the decks, lockers or anything like that, that had to be fixed?

A. Yes, there was a lamp locker and some work forward.

Q. Do you remember what was done with 30 ft. of ceiling 1x3?

A. Yes sir.

Q. Where was that used?

A. She has tongue-and-grooved inside of her toothpick; that naturally above the guard the inside was ceiled up with tongue-and-grooved ceiling. That had to come out to get the apron in.

Q. Where was this oakum used?

A. In corking the vessel.

Q. Was it necessary to have two bales of it for the work that you did there?

A. Most decidedly.

Q. Mr. Hollywood, was anybody representing the Inland Navigation company there looking after these repairs when she was on the dock?

A. Yes sir.

Q. Who?

A. Mr. Bishop.

Q. Was Mr. Walker there?

A. Mr. Walker was the man that made the survey.

Q. Did he inspect the vessel when she came off?

A. Yes sir.

Q. Is it a fact, or do you know, by whom the directions for the repair of the vessel were given?

A. Mr. Walker ordered the work done and left Bishop there to see that we did the work carried out as he ordered it.

Q. I will ask you to look over that bill again, Mr. Hollywood, and tell us whether there is anything on that bill that was not used in the making of these repairs around the stem and bow of that vessel, with the exception of that paint. Look the whole bill over.

A. There is nothing here that I can see that would not be used for it.

*Cross Examination:*

Q. (Mr. Hughes). You were foreman for the Heffernan Dry Dock company?

A. Yes sir.

Q. For how long?

A. Five years.

Q. Up to what time?

A. The 15th of last September.

Q. Since that time you have been with the Construction company?

A. Yes sir.

Q. Mr. Hollywood, how many times have you had the Rosalie on the Heffernan Dry Dock during the five years you were there?

A. I should say that we have her between six and probably eight times.

Q. Did you ever replace the stem during that period?

A. Yes sir.

Q. You have replaced the stem. When?

A. Well now, it is about three years ago, in April, 1911, I believe.

Q. I mean prior to 1911. In the five years you never replaced the stem.

A. No.

Q. That is prior to 1911 we are talking about.

A. Yes.

Q. And during the repairs that you had made on that vessel when you had her on dry dock during the preceding five years, you never had replaced the stem.

A. No.

Q. Had you ever done any repairs to the stem?

A. That is asking something I cannot—in all probability we did—but I do not remember of any. Just minor repairs when a vessel goes on the dock, she is likely to have a little tinkering up all over.

Q. Did you ever have any repairs from a collision during that five years, to her bow?

A. Well, just the once.

Q. Prior to 1911, April, 1911?

A. No.

Q. She came down there for the annual overhauling and repainting didn't she?

A. When are you speaking of?

Q. Every year, practically?

A. Oh yes.

Q. And that occurred about April each year, did it not?

A. That of course would be determined by whether they could spare her at that time. They tried to get her around April each year as near as they could.

Q. Had you repainted the hull in April, 1911?

A. Just from the water line down.

Q. Are you sure about that?

A. Yes, most positively.

Q. You had her in September, 1910, didn't you?

A. I could not say whether we had or not.

Q. Don't you remember that her stern was injured, the propeller carried away in the summer of 1910, and that you had her on the dock and repaired her sometime during the summer or early fall of 1910?

A. No sir, I cannot recollect that.

Q. You do not have any recollection of that at all?

A. No.

Q. Do you remember putting in a spare iron propeller and holding over to her annual docking to put in a bronze propeller?

A. I cannot recollect that.

Q. Now on this occasion in 1911, you did put in a bronze propeller, didn't you?

A. I would not say that I did, because I do not remember.

Q. Whenever you made repairs a surveyor's report was given to you as the basis for the repairs?

A. Yes.

Q. And these surveys were made by Mr. Walker?

A. Yes sir.

Q. And usually had some one representing the Insurance men. Now I show you a report, an extended report of survey, of 8, 16 and July 27, 1910, and I will ask you to look at that and then state whether or not you recollect making the repairs called for by that survey?

A. No sir, I did not do that job.

Q. You were foreman?

A. No sir, I was not. That job was done in the Moran company yard, not the Heffernan.

Q. Heffernan did not do that job then?

A. No sir.

Q. Well now, I will ask you if you have any recollection of putting a propeller in when you repaired her in April, 1911, a new bronze propeller?

A. No sir, I do not recollect.

Q. Have no recollection of that at all?

A. No sir.

Q. You had the survey of Mr. Walker and Mr. Fowler, on which to make these repairs in 1911, didn't you?

A. Yes sir.

Q. I will ask you to examine the paper I now hand you,



being report of survey, accident of April 8th, 1911. I will ask you if that is the survey under which you made these repairs?

A. Yes sir.

Q. You observe in that report that the statement is made that a new bronze propeller be installed at this time per recommendations report of survey September 10, 1910. Now I ask you whether you recollect that you put in that new bronze propeller?

A. Well sir, I could not tell you, honestly; I do not know.

Q. You do not have any distinct recollection about this job anyway?

A. Yes. Most decidedly. You see my end of this is the wood work. The iron work and installation of the propeller comes under the machinists. He could put that propeller on and it would not impress me at all.

Q. Would he be doing it while you were at your work?

A. Yes. He would be at one end of the ship while I would be at the other.

Q. Well now, it appears from that that there was a report in September, 1910, requiring this work to be done, and I notice in the bills that have been furnished by the respondent in this case, this statement in the report at that time, the vessel was not due for ordinary docking, that is September, 1910—the vessel was not due for ordinary docking and painting, having been last painted in April, 1910, and would not have been painted again in the ordinary course again until April, 1911. Now I ask you if you remember whether you did repaint the vessel in April, 1911?

A. We repainted the vessel's hull from the water line on down.

Q. That would have to be done regardless of this collision?

A. If you haul a vessel out you have to paint her.

Q. You have to paint her annually anyhow, don't you?

A. No, we have not.

Q. Well, they do point her annually?

A. It is the practice, yes, but if you haul a vessel out at all you have to paint her.

Q. How many men did you have employed in doing this work, have you any recollection?

A. I should say we worked right on the ship probably thirty men, working on the hull; and twenty-five or thirty men working through the yard for the same job.

Q. What would they be doing in the yard if not working on the repair?

A. Work in connection with the repair.



Q. Yes but what would they be doing in the yard?

A. Working on the repairs at the forward end of the vessel.

Q. What repairs would be doing in the yard which they would not be doing on the ship?

A. Well, they would be hewing timbers. There would be a band sawyer sawing these timbers. There would be men getting them along, ligning them, hewing them and getting them ready to go in place. The blacksmith and helper would be getting out fastenings; another blacksmith and helper repairing the stem, and a bunch of helpers carrying the stuff aboard the vessel.

Q. Could you work 25 or 30 men on this vessel at a time?

A. Yes, easily.

Q. Did you?

A. Yes.

Q. Do you know anything about what men were working on this job in the yard?

A. I most certainly did.

Q. Did you keep in your office books, keep a record of the amount of time they put on each job?

A. Yes sir.

Q. Heffernan's book keeper kept the record of the number of men and the time they put in on each job?

A. Well now, that is a question. I would keep that for my own information.

Q. Have you got such a record as that?

A. Oh no.

Q. Has the Heffernan company such a record? It must have it must it not?

A. No.

Q. Why would it not have it?

A. Because they would not get it.

Q. Why not?

A. The time for the men would be turned in, so many men, so many days.

Q. You kept a regular daily record of that, didn't you?

A. I would for my own information.

Q. Well, but you gave it in, you kept it in a book, you are required to keep it?

A. Yes—

Q. That book would be preserved?

A. Each item, each time you supply a man you would not keep a note of it for his time.

Q. But you would charge for that work each particular

time on one particular job; you would keep the number of hours that a man worked on a particular job?

A. No sir.

Q. You did not do that?

A. No sir.

Q. How could you make up a bill if you did not?

A. For the simple reason there was no other work in the yard except the Rosalie, and the men in the yard were working on the Rosalie.

Q. Then you must have a record of the time each man worked?

A. Yes sir.

Q. Where is that record?

A. For all I know the Heffernan people have it.

MR. HUGHES: I would like to have that produced.

Q. How many days was she in dock?

A. I do not remember just how many days she was; she should have been about four days in the dock.

Q. What did you do with this stem iron?

A. We took the stem iron off. It was broken in two different places. We took it off and tried to weld it, and we could not get it thickened up the broken parts sufficiently, and we made a new stem for her.

Q. Is there any difficulty about welding ordinary wrought iron? This was wrought iron stem was it not?

A. This was wrought iron.

Q. Any difficulty in welding ordinary wrought iron?

A. Well, the thing is this, that that iron had been submerged so long and the action of the salt water, it would not weld.

Q. The iron then was crystalized and old and needed new iron didn't it?

A. It would not need new iron except it was broken.

Q. You say that the 256 feet of fir 8x24 16 feet long was used for the stem?

A. No, the apron piece.

Q. For the apron piece.

A. Yes sir.

Q. The apron is in front of the stem?

A. Behind the stem.

Q. Behind the stem.

A. Yes sir.

Q. Was the apron broken?

A. Yes sir.

Q. How long had it been since the apron had been replaced? How long had that apron been in there?

A. I could not tell you that.

Q. As far as you know it had been in since the ship was built?

A. As far as I know.

Q. What is the ordinary life of such an apron?

A. Until it gets broken.

Q. Well, they decay, don't they?

A. They decay, certainly. It would last probably 25 or 30 years.

Q. It will not last ordinarily over 12 or 15 years?

A. Yes.

Q. Do you know how old the Rosalie is?

A. Well, I should judge she is about—

Q. About 25 years old, is she?

A. I could not tell you.

Q. The item of 1422 feet of fir 3x12 20 feet long, where did that go?

A. That 3x12 would be her planking.

Q. The item of 2031 feet 3x12 30 feet long, what would that be?

A. Planking.

Q. The planks were not 20 to 30 feet long?

A. Some, I should judge, would be more than that.

Q. They are all different lengths?

A. Yes sir.

Q. They cross each other?

A. Yes sir.

Q. You took plank out on each side?

A. On the starboard side.

Q. Was the original planking on that originally 20 or 30 feet long?

A. Yes sir.

Q. 84 feet of fir 6x12 14 feet long. What was that for?

A. 6x12. That would be for main deck beams.

Q. Where did that go in?

A. The main deck runs right forward and butts against the apron piece.

Q. How far back on the apron would these beams go?

A. Well, you would have one beam right close up against it.

Q. That would not be very long.

A. No, but as you go further back they would get longer.

Q. How many of them?

A. Well, I should say there would be three or four beams.

Q. Do you have any recollection of how much of the vessel, the bottom and sides, you put yellow metal on?

A. There was some of the yellow metal broken on the port side and the stem. The yellow metal goes over the plank and on to the stem. On the port side that would require one strip, vertical, of yellow metal on the port side. On the starboard side all the plank that was stripped off we had to tear off the yellow metal to get it off. That would be over forty aft of the stem on the starboard side.

Q. You were instructed to replace the metal injured. But none of it was injured except about the stem?

A. It is impossible to take it off without injuring it.

Q. Did you replace any of it?

A. No sir, .

Q. What did you do with it?

A. We turned it in there and threw it over the wharf.

Q. Threw it in the bay, did you?

A. Yes, dumped it in the bay.

*Redirect Examination:*

Q. (Mr. Robinson). Mr. Hollywood, in planking a ship, do you have to shape the planks, cut them down in any way?

A. Yes.

Q. What I am trying to get at is this: Suppose you had a plank 12 inches wide and 20 feet long, would that cover that much surface of the ship?

A. No sir, it would not; in some cases it would not cover the width of it; you might get a plank three inches wide or four inches wide out of that plank for the new plank.

Q. What is the cause of that?

A. The spanning of the vessel.

Q. Especially around the bow.

A. Yes.

Q. Now this stem iron. How much of an affair is that. Is that in two or three pieces?

A. The stem iron should be made and is generally made in one piece. And at the top it would probably be three by four and as it goes down it widens out until it gets to where it would be one inch by eight. It would be 35 to 36 feet long.

Q. Is there much blacksmithing work in repairing one of these?

A. Yes. It is not blacksmith work alone, but you have to make a wooden templet the shape of the vessel's stem, and the blacksmith works to this templet.

Q. (Mr. Hughes). Was there any different work done from that called for in the report of survey?

A. No sir, not that I know of.



Q. No other damages were found except those pointed out by the survey?

A. Well, when the survey was made first, it was impossible for the surveyors to see the interior damage, because the vessel at that time was not opened up.

Q. Well, they made a full survey for you to work on before you did the work?

A. Yes sir, as far as it could be seen.

(Witness excused).

FRANK WALKER, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. Robinson). What is your business, Mr. Walker?

A. Marine surveyor and Naval Architect.

Q. You have been in that business on the sound here since 1893, I believe, or sometime thereabout?

A. No, not quite as long as that. 1896 I think I came here, I cannot recollect exactly.

Q. Now you remember the *Rosalie* was injured in a collision in April, 1911, I think it was, Mr. Walker?

A. Well, I remember of a collision to the *Rosalie*. I cannot say the date, but I made a survey of it.

Q. I show you Claimant's exhibit No. 7, Mr. Walker, and ask you if you remember making that survey there?

A. Yes sir, I have a recollection of that survey now. I drew it up.

Q. Who was with you?

A. Mr. Fowler.

Q. Who was Mr. Fowler?

A. He was Lloyd's Register surveyor, representing the underwriters.

Q. Who were you representing as surveyor?

A. I represented the owners.

Q. The owners of the *Rosalie*?

A. The owners of the *Rosalie*.

Q. What is the practice when you send a boat to be repaired. Mr. Walker, do you give them a notice of what is to be done?

A. Yes, I make a survey. I generally take my notes at the time and then I write them out, and generally, of course, I did not go into detail as to how many inch screws or bolts, but would say replace this or renew that and everything that comes in with it.

Q. But the directions you gave the people on the ship are substantially the recommendations in that survey?

A. Practically the same thing. I did not draw the survey



up until afterwards. I may have written that out on their order form for the work to be done.

Q. I show you libellant's exhibit "B", which purports to be a bill of the Heffernan Dry Dock company. Look over that bill and see if you can recollect at this late date what you directed to be done, substantially?

MR. HUGHES: I object to this because it is not composed of the written directions made by Mr. Walker. The written directions should be produced here, what he required to have done. This bill was not made by him?

A. Of course a good many times I give instructions verbally but as far as I can see this bill is for the same work that is recommended in that survey report.

Q. Mr. Walker, as representing the owners in the case of this kind, do you look after the repairs in any way, oversee them during their progress or anything of that sort?

A. I always attended the repairs. I do not stay there from morning until night on the repairs; sometimes I go down twice a day to see what is doing, or if anything freshly develops, anything of that description. I generally attend the repairs daily.

Q. Have you a recollection at this time whether you did that in this case?

A. Yes sir, I do it in all cases after I sign a survey report of that description.

Q. Was it part of your responsibility to the owners to look over the bill that is rendered, or do you do that?

A. Yes sir.

Q. Do you remember whether or not you examined this bill?

A. Yes sir, I examined the bills in this case in the same manner that I examined all the others, and I approved the bills for payment.

Q. That is approved them to your principal, the owner, the Inland Navigation company in this case?

A. Yes sir.

Q. Do you know what the practice of the Underwriters, do they go over the bills?

A. Yes, all Underwriters claims are approved by the Underwriters' surveyor and owners' surveyor.

Q. Do you remember whether that bill was approved by Mr. James Fowler and yourself?

A. Yes, that bill was approved by Fowler and myself.

Q. Mr. Walker you survey vessels here for repair from time to time. Now do you think the bill of the Heffernan Dry Dock company, in your hand there, showing the total,

do you consider that this is a reasonable bill for that work?

A. When that bill was presented for my approval and the Underwriters approval, we considered the bill reasonable for the work done, or we should not have approved it; and it was paid on our approval.

Q. Was that work necessitated by that collision?

A. Yes, all of this work called for in this survey report was necessitated by that collision.

Q. What about this proposition of painting, Mr. Walker. It has been testified here that it was necessary to repaint the vessel's bottom when taken out on the dry dock on account of deterioration.

A. The paint perishes.

Q. When it gets air?

A. Yes. The Underwriters always pay for the painting in these cases simply because the paint perishes after it is exposed to the air for a matter of 12 or 24 hours.

*Cross Examination:*

Q. (Mr. Hughes). This ship is annually repainted, is she not?

A. That is the usual custom, but I think this ship had been previously painted three or four months before.

Q. Now you surveyed her:

A. September.

Q. Of the previous year?

A. Yes. I think she was painted at that time, if I recollect.

Q. You examined the bills of Moran Brothers who did the work at that time, didn't you?

A. Yes sir.

Q. I show you a copy of the bill furnished by respondent to me and ask you to note the note contained in that bill, which reads as follows: The vessel was not due for ordinary docking and painting, having been last painted in April, 1910, and would not have been painted again in the ordinary course until 1911.

A. That is a note the adjusters put in, and owing to that note the Underwriters would be compelled to paint at that time?

Q. As a matter of fact she was not painted and this bill does not so show?

A. She was painted. The whole hull was washed. Docked and the vessel was cleaned and painted as directed. She was painted in September and therefore would not be due for another coat of paint until the following September.

And the reason that note was put in was to explain to the Underwriters that the vessel was not due for painting although she was painted in September.

Q. That is nothing but the hull of the vessel?

A. Yes, all this is painted, the bottom and the under portion.

Q. Mr. Walker, you say you O. K.'d this bill of the Heffernan Dry Dock company?

A. I approved it, yes.

Q. How did you approve it, right on the bill, put your O. K. right on the bill?

A. I think I approved it by my stamp on the bill.

Q. That was the bill then that was paid?

A. That was the bill that was used at the time for making up the adjustment of these bills that go to the Underwriters; this is only a copy of the bill here.

Q. You O. K.'d that in duplicate?

A. Oh no, I did not, only the original one.

Q. The Inland Navigation company has to keep its own vouchers don't it?

A. They paid by voucher, and they did not care anything about the bill. I approved the bill that is presented to the Underwriters the same as the Underwriters surveyor, we approved the bill together.

Q. You did that in duplicate?

A. No, I do that with just one bill that is going to be presented for adjustment.

Q. Did not the company keep a duplicate of the bills?

A. They pay the bill after they know that we approve it, they pay it by voucher and check; they do not have that exact bill receipted.

Q. Do you know where these bills are that you approved?

A. They may be among the Underwriters papers in San Francisco or London. They go forward to the Underwriters with the adjustment, the approved bills.

Q. These bills could be easily obtained to show exactly what you approved. You cannot tell by looking at some other paper three years afterwards whether they are the same you approved or not, can you?

A. I know this bill in this case was entered in that adjustment. I have been over that adjustment personally at the time it was drawn up.

Q. Was there a propeller put in at this time, a bronze propeller?

A. There was a new propeller recommended owing to an accident to the propeller in September, sometime in

September, 1910. Then the vessel in ordinary course would have gone on the following September had not she had that accident, then advantage was taken of her being on the dock to install the propeller.

Q. You mean in April?

A. Yes.

Q. You put in a temporary propeller?

A. Spare propeller; all vessels keep a spare propeller.

Q. Not a bronze propeller that?

A. I do not remember.

Q. I think the papers show it was not.

A. I did not say a new bronze propeller; they generally keep in store a cast iron one as a spare.

Q. That was installed in September temporarily because there was no new bronze propeller at hand?

A. They did not have a new bronze one at hand so they put on a cast iron one.

Q. What became of that bill for that bronze propeller? Who got that? That is not on this bill?

A. The Moran people made the bill in that adjustment for that propeller, or in an adjustment.

Q. Who paid for the bronze propeller?

A. The Underwriters paid for it. You will find the bill for the propeller somewhere. (Examining papers). Here is the bill, \$932.40.

Q. Who installed this propeller at the time it was installed?

A. That propeller was shifted down to Heffernan's Dry Dock and installed by Heffernan's machinists.

Q. Moran Brothers furnished it?

A. Moran Brothers furnished it.

Q. And it was installed by Heffernan's machinists?

A. Yes sir.

Q. What became of the bill for installing it?

A. There would be another bill somewhere for that.

Q. That would be by Heffernan?

A. That would be by Heffernan.

Q. That is what I want to see. I have never been able to find it. Does the whole bill come from the Moran company for the Heffernan work?

A. Now the vessel might have been on the dock and no chance to put it on; it is no job to put a propeller on. Just put it on and screw it up. There might be no bill for it. If I remember right, I think the Port Engineer and his assistant put it on. Here is the engineer's bill that is allowed for that purpose, I think.



Q. Then you charged it to us, the cost of putting in the propeller that was knocked off by accident the previous summer?

A. No, they did not charge anything for it.

Q. You have it right in the bill here, chief engineer, 8 days and assistant four days?

A. It is not allowed here.

Q. But it is put in our bill?

MR. ROBINSON: No, it is not there.

A. No, machinists and engineers. Charged only carpenters and blacksmiths, these were charged in this bill in another adjustment that will be shown where charged to the Underwriters. The crew installed the propeller.

Q. It is said in this bill, purports to be a Moran company bill, but is you say in reality the Heffernan bill?

A. This was not due for ordinary docking, having been last docked for repairs and painted in September, 1910.

Q. Then it says further, according to survey report of April 8th, 1911: New bronze propeller was installed at this time, as if this work did not affect the seaworthiness of the vessel; the whole of this docking is charged to this accident of April 8th?

A. This is for taking a propeller off and putting another on, that don't mean anything at all. The vessel was there on the dock all the time when they were making the repairs, and it is a very common occurrence for ships to change propellers, the crew to change propellers.

Q. Do you know whether they did in this instance?

A. I believe they did, otherwise there would be a bill for it. They never miss a chance to make a bill, you know.

Q. Do you know whether they kept a record of the time they devoted to the work done at the Heffernan Dry Dock company?

A. I have no idea what records the Heffernan people kept.

Q. You know that is the practice to keep a record of the amount of hours that each man devotes to a particular job?

A. Well, they keep a record at the time, Mr. Hughes. I don't know how long they keep that record. It is not necessary after the bills are made out, I should think; they would soon fill the office with time sheets if they did.

Q. Well, they have books?

A. That bill is copied into one of their own bill books and that is the record they keep. They could give you a copy of that

Q. How old is the Rosalie?



A. I don't know, I am sure.

Q. You know practically, don't you?

A. No. She was built in San Francisco some twenty years ago.

Q. More than twenty years?

A. I don't know. I was not around here then.

Q. Who is Mr. Bishop?

A. He was Port engineer.

Q. What was he doing in 1911?

A. He had been Port engineer for years.

Q. For the Inland Navigation company?

A. Yes sir.

Q. He is still with them, is he?

A. He is still with them? He looked out for the upkeep of the boat.

(Witness excused).

Hearing adjourned.

UNITED STATES OF AMERICA,  
WESTERN DISTRICT OF WASHINGTON, } ss.  
NORTHERN DIVISION. }

I, A. C. Bowman, a Commissioner of the United States District Court for the Western District of Washington, residing at Seattle, in said District, do hereby certify that the foregoing transcript from page one to page 243, both inclusive, contains all of the testimony offered by the parties to said cause.

The several witnesses, before examination, were duly sworn by me to tell the truth, the whole truth and nothing but the truth.

I reduced the testimony to writing in shorthand and thereafter caused the same to be typewritten, and I certify that said testimony is the testimony given by the said witnesses on the dates indicated in the transcript.

Proctors for the parties waived the reading and signing of the testimony given by the witnesses, agreeing that the same should have the same force and effect as if so read and signed by them.

The exhibits offered as shown in the testimony and the index are returned herewith.

I further testify that I am not of counsel nor in any way interested in the result of this suit.

WITNESS my hand and official seal this 18th day of August, 1914.

[SEAL]

A. C. BOWMAN,  
*U. S. Commissioner.*

COMMISSIONER'S TAXABLE COSTS:

Libelant,

Hearings March 25, June 6, 1913, July 3, 1914.....	\$ 9.00
Administering oaths to 11 witnesses.....	1.10
Marking and filing 3 exhibits.....	.30
Transcribing above hearings 381 folios at 10c.....	38.10
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	\$48.50

Claimant,

Hearings Sept. 5, 1914, Jan. 13, Feb. 1, July 3-14....	\$12.00
Administering oaths to 12 witnesses.....	1.20
Marking and filing 6 exhibits.....	.60
Transcribing above hearings 303 folios at 10c.....	30.30
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	\$44.10

(ENDORSED)

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Aug. 18, 1914.

FRANK L. CROSBY, *Clerk.*

By E. M. L., *Deputy.*

In the District Court of the United States for the Western District of Washington, Northern Division.

THE INLAND NAVIGATION COMPANY, A CORPORATION,

Libelant,

vs.

THE TOW BOAT "TILlicum", HER ENGINES, BOILERS,  
etc.,

Respondent,

STIMSON MILL COMPANY, A CORPORATION,

Claimant and Cross-Libelant.

No. 4730

*Motion for Leave to Take Further Testimony.*

Comes now claimant of the tug "Tillicum" and moves the Court to re-refer this cause to A. C. Bowman as Commissioner, for the purpose of taking further testimony respecting the performance of the duty to maintain a proper lookout on the part of the tug "Tillicum", and as grounds for this motion respectfully shows the Court:

That the libelant in its libel makes no charge that the tug "Tillicum" was at fault for failing to maintain a proper lookout at and prior to the time of the collision complained of. That since said cause has been reported back to the Court the proctors for libelant, in presenting their brief,

for the first time make the contention that the said tug "Tillicum" was negligent in the particular aforesaid, basing such contention on an incidental statement of the master of said tug. That by reason of said contention being now made it becomes material to introduce such additional proof, which can be speedily taken without any unnecessary delay in the final hearing of this cause.

HUGHES, McMICKEN, DOVELL & RAMSEY,  
*Proctors for Claimant.*

Copy of within motion received, and due service of same acknowledged this 31st day of August, 1914.

BRONSON & ROBINSON,  
*Proctors for Libelant.*

Endorsed: Motion of Claimant for Leave to Take Further Testimony. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Sep. 2, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western  
District of Washington, Northern Division.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	} Libelant,	} No. 4730
vs.		
THE TOW BOAT "TILlicum", HER ENGINES, BOILERS,	} Respondent,	
etc.,		
STIMSON MILL COMPANY, A CORPORATION,		
Claimant and Cross-Libelant.		

*Order Granting Motion for Leave to Take Further Testimony.*

This matter coming regularly on for hearing, on the motion of the claimant for an order of this Court re-referring this cause to A. C. Bowman, as Commissioner, for the purpose of taking further testimony respecting the performance of the duty to maintain a proper lookout on the part of the tug "Tillicum", and it appearing to the Court that good cause exists for the granting of said motion,

It is hereby ORDERED that this cause be and hereby is re-referred to A. C. Bowman as a commissioner for the taking of further testimony respecting the performance of the duty to maintain a proper lookout on the part of the tug "Tillicum", with directions to said Commissioner to take

said testimony and return the same to this Court within ten days.

Done in open court this 8 day of September, A. D. 1914.

JEREMIAH NETERER, *Judge.*

Endorsed: Order Granting Motion for Leave to Take Further Testimony. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Sep. 8, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

INLAND NAVIGATION COMPANY, A CORPORATION,	Libellant,	} No. 4730
<i>vs.</i>		
THE TUG "TILlicum," ETC.,	Respondent,	
STIMSON MILL COMPANY, A CORPORATION,	Claimant.	

To the Honorable Judges of the above entitled Court:

Pursuant to the order of reference referring this cause for the taking of further testimony, on this 10th day of September, 1914, the libellant appeared by Mr. Robinson, of Bronson & Robinson, its proctors, and the Claimant appeared by Mr. Hughes, of Hughes, McMicken, Dovell & Ramsey, its proctors; thereupon the following proceedings were had and testimony offered:

*Claimant's Testimony.*

E. N. CHARLESWORTH, recalled, on behalf of the Claimant, testified as follows:

Q. (Mr. Hughes). Captain, referring to the occasion of the collision between the Tillicum and the Rosalie on the morning of the 8th of April, 1911, who was on duty or watch navigating the Tillicum that morning?

A. A. W. Anderson.

Q. Was he a licensed pilot for these waters?

A. Mate and pilot, yes sir; at the time he was master and pilot.

Q. But he was acting as pilot?

A. Yes sir.

Q. And you had a master's license and pilot's license also?

A. Yes sir.

Q. Now you have testified that you were in the pilot house. Why were you there?



A. To keep a lookout.

Q. The general rules and regulations prescribed by the Board of Supervising Inspectors, rule 38, requires steamers navigating as this was at that time, dark, to have some one in addition to the pilot on watch, some other member of the crew of the boat also, on watch, in or near the pilothouse. Why did you have no one else beside yourself?

A. Because I would not trust anybody else but myself. I wanted to be there myself and see what was going on, to keep a good lookout.

Q. Was that the sole reason why you were in the pilot house?

A. Yes sir.

Q. Let me ask you whether one could perform the duties of lookout on the bow of that boat or on the bow of the barge, as well as he could in the pilot house or up in front of it?

A. You can keep a better lookout from the wheelhouse.

Q. When I say pilot house I mean wheel house.

A. Yes.

Q. What do you say as to whether you could see an approaching vessel in the dark and the fog better from that point than you could down on the bow of the tug or barge?

A. You could see better from the pilot house, because you are up higher.

Q. Let me ask you whether you could hear as well up there?

A. Yes, hear better from the pilot house.

Q. Any noise in the pilot house to interfere with your hearing?

A. No sir.

Q. Anything to interfere with your seeing?

A. No sir.

Q. Was there a greater noise on the bow of the tug or on the bow of the barge?

A. There is a little swash from the bow of the barge.

Q. From the waters, you mean?

A. Yes sir.

*Cross Examination:*

Q. (Mr. Robinson). Captain, do I get a correct understanding of your former testimony that you were blowing fog signals yourself and handling the whistle cord that morning? Were you or were you not?

A. It has been so long ago I hardly remember. I remember giving a fog whistle and a danger whistle, and the reverse, backing up signal, the bell.



Q. When you heard the echo, you got an echo at one time from the whistle ahead of you which was the first intimation that you had that there was something ahead of you, as I recollect your testimony?

A. Yes sir.

Q. Do you remember now whether you blew the whistle that you got that echo from?

A. I cannot hardly remember, it has been a long time ago.

Q. Captain, as I recollect your testimony given before, that before the collision happened you had been going for some little time with a slow bell, trying to get echos from the bluff. Were you blowing these whistles yourself do you remember, to get that echo?

A. No sir, the pilot.

Q. Did you and Anderson, the pilot, confer at any time about that echo there, talk about it, when you were in the pilot house?

A. No sir.

Q. Did you have any conversation with Mr. Anderson at all going up along the water front, do you remember?

A. No sir.

Q. Do I understand you to mean that you did not have any conversation or that you do not remember it?

A. I just asked him what he was steering, that is all. It was no conversation; I asked what course he was on.

Q. In case of any emergency captain, of any kind, occurring, when you were going along there with Mr. Anderson, you would exercise your functions as captain of the vessel, would you not, you would take charge, would you not, if anything turned up?

A. Yes sir.

Q. You did, as a matter of fact, didn't you, as soon as you got wind of another vessel in the vicinity?

A. Yes sir. As soon as I took charge Mr. Anderson kept the lookout.

Q. And the wheel?

A. I took charge of the wheel then.

Q. Was Anderson at the wheel all the time?

A. Yes sir.

Q. During that whole trip?

A. No sir.

Q. I mean from the time you left the dock until the collision?

A. Yes sir.

Q. Captain, can you tell offhand, about how far the house

is on that tug, that is from the front of the pilot house to the rear wall, do you know or would you have to guess at it?

A. I would have to guess at it.

Q. How much do you think?

A. It would not be over twenty or twenty-five feet at the least, the pilot house is very close to the bow.

Q. You mean that the house is twenty-five feet long?

A. No, from the bow.

Q. The house is twenty-five feet from the bow.

A. I judge that, looking right straight down like that. You see there is room enough for a man to walk in between the towing post and the front of the house, and then comes the anchor and the gear on the bow.

Q. How far is it from the pilot house windows to the bow?

A. Not any more than twenty-five feet; that is a rough guess, you know I never measured it.

Q. The deck rises as it goes toward the bow on the Tillicum, does it not?

A. That is according to how she is loaded; if she is empty of fuel forward, she will come up with the bow. The Tillicum is mostly on an even keel when loaded; she was loaded heavily at that time.

Q. Would not the deck be higher at the bow on this occasion than the deck would be right at the end of the pilot house? You understand what I mean?

A. Not exactly.

Q. What I mean is this: Would not there be a slope from the bow to the pilot house, a sloping of the deck?

A. She has bulwarks, you know, about two feet high.

Q. If a man was standing right in her bow on the deck, would not his standing place be more elevated than if a man was standing on the deck back at the pilot house, right in front of the pilot house? What I mean is has she got a straight deck along there?

A. Yes sir.

Q. It is straight.

A. Yes, kind of.

Q. There is a kind of a slope to it, is there not?

A. Depending on how the vessel is loaded.

Q. How high is the floor of the pilot house above the deck on the outside?

A. I could not tell you.

Q. Cannot you give an estimate? Is it a great distance? How many steps have you got up there?

A. Six steps from the lower deck and two, that is eight;

it would be all of 15 feet from the deck to the pilot house.

Q. Would the pilot house floor be 15 feet higher than the deck at the bow?

A. Yes sir.

Q. Then, as I recollect it the barge projected beyond the bow of the tug about thirty feet. If a man was out on the bow of that then he would be forty or fifty feet from the pilot house, would he not. It is thirty feet from the bow of the barge to the bow of the tug?

A. The scow was a hundred feet, and she was no more than 12 feet past the bow at that time, she was pretty well back; it would be about 12 feet past the bow on the port side.

Q. Well then, it is about 25 feet back to the pilot house; under your present testimony it would be about 37 feet.

A. Somewhere around there, yes.

Q. Captain, if a man was out on the bow of that scow, that would give him say thirty-seven feet further ahead, and could he not see just that much further into the fog than a man in the pilot house?

A. I don't think so.

Q. Why not?

A. Because he was down low.

Q. How much lower would he be?

A. He would be about the same as he would be at the bow of the boat, about 15 feet below the wheel house.

Q. But that would depend on the character of the fog, whether it was a low lying fog?

A. I think a man in the wheel house could see better than a man on the end of the scow, in my judgment; and practically it is not a safe place out on the end of the scow.

Q. Captain, you would not hear much ripple of the water around the scow when you were traveling three knots an hour, would you?

A. Yes, you could hear the wake of the scow going into that, the headway of the scow.

Q. Where are the engines of the tug with reference to the pilot house?

A. They are below decks.

Q. Are they right immediately behind the pilot house?

A. No sir, well aft.

Q. How far aft?

A. I could not say how far aft.

*Redirect Examination:*

Q. (Mr. Hughes). Captain, when you spoke of the distance from the pilot house down to the bow, you mean the diagonal distance?

A. Right straight down that way, I should judge, I never measured it.

Q. From the deck, starting from the deck immediately in front of the pilot house, about what distance is it to the bow there on the deck, the deck space in front of the pilot house, you testified before it was 12 feet?

A. It is just about 12 feet, somewhere around that. I haven't any idea, about 12 or 14 feet.

Q. (Mr. Robinson). How far is it from the back end of the house, the back wall to the stern of the tug?

A. I could not answer that question. I never measured it. It is pretty hard to tell, you know, for I never measured it, I would have to guess.

Q. What do you think?

A. I have no idea.

(Witness excused).

A. W. ANDERSON, recalled, testified on behalf of the claimant as follows:

Q. (Mr. Hughes). Did you have a pilot's license at the time you were acting in the capacity of mate on the Tillicum on the 8th of April, 1911?

A. Yes sir.

Q. Was it your watch on duty?

A. Yes sir.

Q. Navigating that ship as pilot all the time from the time she left the dock at Seattle until just before the collision?

A. Yes sir.

Q. Was it your watch?

A. Yes sir.

Q. Who acted as lookout?

A. Captain Charlesworth.

Q. Is that the usual custom?

MR. ROBINSON: I object to the proof of any custom on the ground that it is incompetent, irrelevant and immaterial.

A. Yes sir.

Q. I will ask you if that is the practice here, in pursuance of rule 38 of the General Rules and Regulations prescribed by the Board of Supervising Inspectors—I call your attention to that rule.

A. Yes sir.

MR. ROBINSON: I object to this testimony also on the ground that it is incompetent, irrelevant and immaterial.

Q. Captain, what is the best place on that tug for the lookout at night time in a fog?

A. In or in front of the pilot house.



Q. Could a lookout have performed the services as well at the bow of the tug or on the front of the barge?

A. No sir.

Q. Captain Anderson, I notice that counsel makes a certain contention in regard to your testimony which was given before, which prompts me to ask you a question or two in order that you may explain. You testified before that you heard an echo from the Rosalie, an echo from your own whistle, didn't you?

A. Yes sir.

Q. Now in answer to the question which was propounded to you whether your boat slowed down, you said yes. I want you now to state what signal was given when that echo was heard in front of you?

MR. ROBINSON: I object to this line of testimony because it is not germane to the purposes for which the Court reopened the case.

A. Slow bell, slow down.

Q. Well, how was that.

A. That was a stop just before that.

Q. That signified the doing of what?

A. Stopping the engine.

Q. I assume that the boat does not stop when the engine is stopped, simply gradually diminishes speed?

A. Yes sir.

(Witness excused).

R. A. TURNER, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. Hughes). What position do you hold?

A. Local Inspector of boilers; steamboat inspector.

Q. You act in conjunction with captain Whitney, Inspector of Hulls, as a board of Local Inspectors, do you?

A. Yes sir.

Q. You know the tug Tillicum?

A. Yes, I do.

Q. She is an enrolled and licensed tug, is she?

A. Yes sir.

Q. What rule governs these tugs or vessels of that kind operating in the night or darkness or in a dense fog?

A. What rule governs? In what respect?

Q. As to the keeping of a lookout, where and what lookout should be kept? Can you call attention to the rule?

A. Why, all passenger and ferry vessels operating in the night time, as I remember the rule, shall have a lookout—not



a lookout, you can call him a lookout I guess—in or near the pilot house in addition to the pilot.

Q. I call your attention to rule 38 and ask you if that is the rule?

A. Well, I did not get that exactly right. I said lookout. It says "one of the crew," the same thing.

Q. Rule 38 is the rule?

A. Yes.

Q. Now is that the only rule governing in these local waters with respect to licensed and enrolled vessels operated by steam?

A. As to the watch on deck?

Q. Yes sir.

A. That is the only rule I know anything about.

Q. Is that the only rule that is applied by your local board?

A. To inland vessels, that is the deck watch.

Q. That is what I mean, the lookout. I want to read this in evidence "All passenger and ferry steamers shall, in addition to the regular pilot on watch, have one of the crew also on watch, in or near the pilot house; and this rule applies to all steamers navigating in the night time."

A. That is the rule we go by.

Q. Do you know Mr. Anderson here, this gentleman?

A. I have seen him before.

Q. He is a licensed pilot in this district?

A. He may be, I do not know.

Q. Where the pilot is on watch, by that I mean navigating the vessel in the pilot house, what is the rule by you Inspectors as to whether if the master acts as lookout, it is a compliance with rule 38?

A. Why I should say yes.

Q. You always act upon that rule in the administration of your duties as a local board?

A. We would consider the master as good a lookout as there was aboard a vessel, perhaps better.

Q. You know the tug Tillicum, you say?

A. I do.

Q. The pilot house of the tug Tillicum, what do you say as to whether that is a proper or the best place on the boat for a lookout to be stationed?

A. Well, I should think that would be the best place for him. I should think he could see more there than he could even if he was on the bow. As I remember the Tillicum the pilot house is a short distance away from the bow, and a man being higher he could see better.

Q. If she was towing a barge by her side, one of these

square front barges, what would you say as to whether the pilot house would be a more suitable place for a lookout than the bow of the barge in a fog?

MR. ROBINSON: I would suggest that you add to your question how far the barge projected.

Q. Assuming that the barge projected anywhere from 12 to 25 feet or 30 feet in front?

MR. ROBINSON: And add that there were large oil tank cars on the deck of the barge.

Q. Yes.

A. Well, there might possible be some place on that barge where he could see further ahead than he could in the pilot house, providing the barge projected ahead of the boat. But now I do not know the conditions in regard to that. We had the case before us but I do not remember much about it.

Q. You had that case before you. Did you find any fault on account of not having a proper lookout on that occasion?

MR. ROBINSON: I object as immaterial.

A. I do not bring it to mind that we did. Our decision in the matter is on record, but I don't bring it to mind. In fact I had forgotten all about the case, almost.

Q. In a fog a lofty position is a better place to hear is it not, as well as to see, ordinarily?

A. Well now—

Q. To see the lights of a vessel ahead or hear fog whistles of a vessel ahead?

A. I myself never spent any time in the pilot house of a vessel; I would not like to say.

*Cross Examination:*

Q. (Mr. Robinson). These rules, captain, to which you are testifying, are the rules made by whom?

A. The Board of Supervising Inspectors.

Q. As I understand these rules have the force of law, when they are not contrary to any actual law on the subject?

A. These rules are all taken and founded on the United States Statutes. Each one of them will refer you to the statute from which they are taken, the authority they are taken from.

(Witness excused).

L. E. SMITH, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. Hughes). Are you a licensed master and pilot on the waters of Puget Sound?

A. Yes sir.

Q. How long have you been?

A. Master and pilot about six years and a half.

Q. You have acted in that capacity on tug boats in the waters of Puget Sound?

A. Yes sir.

Q. Are you acquainted with the Tillicum?

A. Yes sir, I have been on her.

Q. Assuming that the Tillicum was towing a barge on her port bow, the Tillicum being 87 feet long and the barge towed being 100 feet long and extending out from 12 to 30 feet forward of the bow of the Tillicum, and the barge being barge number 8, are you acquainted with that barge?

A. Yes sir.

Q. Knowing the character then of the barge, the barge having a couple of tank cars on board, what would you say would be the proper place for the lookout to be stationed in a fog and when it was dark?

A. Well, I should say the pilot house of the tug or right on deck.

Q. The pilot house or immediately in front, there is a little space in front of the pilot house?

A. Yes sir.

Q. Is it the custom for a master in operating these tugs under these circumstances, to act as his own lookout, when his pilot is on watch?

A. It has been in all that I have been in.

MR. ROBINSON: I object as incompetent, irrelevant and immaterial.

Q. Do you know why that is done.

A. Well, in my case, I don't feel like trusting anybody else. I think I am better myself at it.

*Cross Examination:*

Q. (Mr. Robinson). When you do that, captain, do you regard yourself as still being in command of the boat?

A. Yes sir.

(Witness excused).

J. C. ACKLES, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. Hughes). Are you a licensed master and pilot on Puget Sound?

A. Pilot.

Q. Do you operate as pilot on tug boats on Puget Sound?

A. Yes sir.

Q. Are you acquainted with the Tillicum?

A. Yes sir.

Q. What is the proper place on the Tillicum for a lookout to be stationed in a fog?

A. In all vessels of her length on the bridge deck forward of the wheel house or in the wheel house with open windows.

Q. Are you acquainted with barge No. 8?

A. I have seen her.

Q. Suppose the Tillicum was towing that barge lashed to her port side, the Tillicum being 87 feet long and the barge 100 feet long, and the barge extending in front anywhere from 12 to 30 feet and was loaded with two oil tank cars, where would you say the lookout should be station in a fog, for the purpose of keeping the best lookout for the safety of the vessel, the lookout on the forward side of the house or in the wheel house?

A. On the forward side of it or in it.

*Cross Examination:*

Q. (Mr. Robinson). If a man was in front of the wheel house would he be standing on the deck or on the bridge deck?

A. She has a bridge deck.

Q. How high is that?

A. The bridge deck itself is about 12 or 14 feet above the water.

Q. How high above the main deck?

A. I should judge about nine feet.

(Witness excused).

MR. HUGHES: I want to call one additional witness, a fireman, whom I was unable to get at the time of the taking of the former testimony; he was not where I could locate him.

I. H. BIGGS, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. Hughes). Were you fireman on the tug Tillicum on the morning of the 8th of April, 1911, when she came in collision with the Rosalie?

A. Yes sir.

Q. Were you on duty that morning?

A. Yes sir.

Q. Did you note whether the Tillicum was blowing her fog signals regularly?

MR. ROBINSON: I object to this testimony as not being germane to the purpose for which this case was re-opened.

A. She was.

Q. Do you recollect whether or not the tug slowed down as she passed approaching Four mile rock?

A. I could not state the position exactly where she was



when she slowed down, but she was running slow for quite a while. I would not say how slow; I did not pay much attention to it.

Q. After she had been running slow for a time did you hear a signal to stop the engines?

A. Yes sir.

Q. Did the engines stop?

A. The engines stopped.

Q. Where were you?

A. At that time I was standing up on what they call the working deck of the engine room, that is on the main deck practically, looking out of the starboard door.

Q. Had you heard a fog signal from her just before she stopped?

A. I had heard fog signals regularly right along. I could not say they were exactly regular, I don't know the time they were supposed to be blown or anything like that, but I heard them now and again and then another, like that.

Q. After the boat stopped did you later hear a signal to reverse the engine?

A. Yes sir.

Q. Do you know whether or not the engines did reverse?

A. The engine did reverse.

Q. Before the engine reversed about how fast was she going when you were looking out of the starboard door?

A. I could not judge how fast she was going, but she was going pretty slow; she was very near stopped, that was practically moving, what I call stopped, going along a little bit, I could not say just how fast she was or just how slow.

Q. Were you standing there after the engine reversed?

A. Why when the engine reversed I jumped down below to open the burners up a little more to keep a full head of steam. After I got them open I started and came up the ladder and I got pretty near up the ladder when I felt a jar of something hitting.

Q. Before you went down had you noticed how the vessel acted as to whether she was making sternway?

A. Before I went down I looked out of the door and I could see the water coming forward; I could see the water coming forward toward the bow of the boat.

MR. ROBINSON: I object to all of the testimony of this witness, and move the Court to strike it and not consider it, for the reason given in my former objection at the beginning of the testimony of this witness. I have no cross examination.

(Witness excused).

Hearing adjourned.



UNITED STATES OF AMERICA, }  
WESTERN DISTRICT OF WASHINGTON } ss.  
NORTHERN DIVISION }

I, A. C. Bowman, a Commissioner of the United States District Court for the Western District of Washington, residing at Seattle, in said District, do hereby certify that the foregoing transcript from page one to page ..... contains all of the testimony offered by the parties under the order of reference made for the purpose of taking further testimony on behalf of the Claimant in said cause.

The several witnesses, before examination, were duly sworn to testify the truth, the whole truth and nothing but the truth.

I reduced the testimony to writing in shorthand and thereafter caused the same to be transcribed in typewriting, and I certify that it is the testimony given by the witnesses at the time mentioned therein.

Proctors for the parties waived the reading and signing of the testimony given by the witnesses, stipulating that it should have the same force and effect as if so read and signed by them, when returned into court by me.

I further certify that I am not of counsel nor in any way interested in the result of said cause.

Witness my hand and official seal this 17th day of September, 1914.

[SEAL]

A. C. BOWMAN, *U. S. Commissioner.*

(Endorsed:) Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Sept. 17, 1914.

FRANK L. CROSBY, *Clerk,*  
By E. M. L., *Deputy.*

*Commissioner's Taxable Costs (Re-reference)*

Claimant:

Hearing September 10, 1914.....	\$3.00
Administering oaths to four witnesses.....	.40
Transcript above hearing, 60 folios at 10 cents.....	6.00
	<hr/>
	\$9.40

*Stimson Mill Company vs.**Claimant's Exhibit 2:*

STIMSON MILL COMPANY

No. 330

PETTY CASH VOUCHER

Date Sept. 2d, 1911

Paid to A. McKay

Paid for 14 Days at 4.50

63.00

Charge to Scow

Received the Above Amount

(Signed) A. McKay.

Paid by L S H

(Endorsed:) Claimant's Ex. 2. Filed January 13, 1914.  
A. C. Bowman, U. S. Commissioner. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division.  
Aug. 18, 1914.

FRANK L. CROSBY, *Clerk.*By E. M. L., *Deputy.**Claimant's Exhibit 3:*

STIMSON MILL COMPANY

No. 328

PETTY CASH VOUCHER

Date Sept. 2d, 1911

Paid to R. Seeles

Paid for 6 days at 4.50

27.00

Charge to Scows

Received the Above Amount

Paid by L S H (Signed) Robt. Seeles.

(Endorsed.) Claimant's Ex. 3. Filed January 13, 1914.  
A. C. Bowman, U. S. Commissioner. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division.  
Aug. 18, 1914.

FRANK L. CROSBY, *Clerk.*By E. M. L., *Deputy.**Claimant's Exhibit 4:*

STIMSON MILL COMPANY

No. 329

PETTY CASH VOUCHER

Date Sept. 2d 1911

Paid to B. Hopey

Paid for 7 days 4.50

31.50

Charge to Scow

Received the above amount:

Paid by L S H (Signed) B. Hopey

(Endorsed:) Claimant's Ex. 4. Filed January 13, 1914.  
A. C. Bowman, U. S. Commissioner. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division.  
Aug. 18, 1914.

FRANK L. CROSBY, *Clerk.*

By E. M. L., *Deputy.*

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*Claimant's Exhibit 5:*

THE MORAN COMPANY

Seattle, April 8, 1911.

Sold to Stimson Mill Co.,

Seattle, Washington.

Our No. C-5557	Ordered by Mr. Ives	Delivered
Lifting Oil Car in place on scow, as per		
directions		50.00

J

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3

4/12

(Endorsed:) Claimant's Exhibit 5. Filed January 13, 1914. A. C. Bowman, U. S. Commissioner. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Aug. 18, 1914.

FRANK L. CROSBY, *Clerk.*

By E. M. L., *Deputy.*

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*Claimant's Exhibit 7:*

(COPY)

REPORT OF SURVEY

Accident, April 8th, 1911.

At the request of the Owners, we, the undersigned, did hold survey upon the above named vessel on the 10th day of April, 1911, and subsequent dates for the purpose of ascertaining the extent of damage alleged to have been sustained by colliding with a scow during her recent voyage from Seattle to Bellingham and return; vessel at time of survey then being on the Heffernan Dry Dock, Seattle, Wash.

By abstracts taken from the vessel's log and by report of the Master, it appears that on April 7th at about 12:02 A. M. the steamer sailed from Seattle bound to Bellingham via ports and return; that nothing worthy of note occurred until April 8th at about 5:10 A. M. during a thick fog the steamer collided with an unknown scow in tow of the Tug

"Tillicum", vessel at time of accident then being on the return voyage and about one mile south of West Pt.

After clearing the scow the steamer proceeded and arrived at her dock in Seattle about 6:10 A. M. the same day. For full particulars of the accident see ship's log and protest.

Upon making a careful examination of the vessel we found the damage to consist as follows:—

The stem and apron from the guards down to the fore-foot badly split and broken and the stem iron bent; also a number of sheets of yellow metal at stem torn and missing.

*Recommendations.*

We recommend that the stem and apron be cut out and renewed complete, stem iron be repaired and refastened in place.

To make it possible to renew the apron, we further recommend that the starboard planking be cut back to suitable butts and be replaced with new planks after the new apron and stem are fitted, the seams of same and hood ends be caulked and painted and filled in with cement below the water line.

The sheets of yellow metal stripped off to allow for repairs be returned again, using as much of the old as possible; the badly torn and missing sheets removed to be replaced by new.

All new and repaired parts be given two coats of approved paint; the bottom be cleaned and given one coat of copper paint.

————— :: —————

This is to certify that we, the undersigned, have attended the repairing of the above named vessel and find that all recommendations made by us and contained in the above report have been carried out and completed to our satisfaction.

A new bronze propellor is installed at this time, as per our recommendations, in report of survey dated Sept. 10th to 13th, 1910.

In our opinion, the vessel is now in a good seaworthy condition, being fit to ply in her accustomed trade.

Respectfully submitted,

Seattle, Wash.

April 8th to

17th, 1911.

(Signed) JAMES FOWLER,

*Surveyor to Lloyd's Agent.*

(Signed) F. WALKER,

*Surveyor for Owners.*

(Endorsed:) Claimant's Ex. 7. Filed February 11, 1914.  
A. C. Bowman, U. S. Commissioner. Filed in the U. S. Dis-

trict Court, Western Dist. of Washington, Northern Division.  
Aug. 18, 1914.

FRANK L. CROSBY, *Clerk.*  
By E. M. L., *Deputy.*

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*Libelant's Exhibit "A":*

Seattle, Wash., April 8th, 1911.

U. S. Local Inspectors,  
City.

Gentlemen:—

On April 8th at about 5:10 a. m. Str. ROSALIE on her trip from Bellingham to Seattle, struck an unknown scow that was being towed in a northern direction by the tug TILLICUM, breaking stem on Str. ROSALIE.

Master of tug reported no serious damage to scow.

Accident occurred about one mile south of West Point, in fog, and Str. ROSALIE had been stopped three minutes before accident and had been backing for about two minutes.

First Mate Hanson was on watch at time of accident.

(Signed) SAMUEL BARLOW,  
*Master of Str. ROSALIE.*

(Signed) J. D. GOSS,  
*Chief Engineer.*

(Endorsed:) Libelant's Ex. "A." Filed March 25, 1913.  
A. C. Bowman, U. S. Commissioner. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division.  
Aug. 18, 1914.

FRANK L. CROSBY, *Clerk.*  
By E. M. L., *Deputy.*

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*Libelant's Exhibit "B":*

STATEMENT

L. F. 2

Seattle, Wash. May 1-1911

S/S Rosalie & Owners

P. S. Nav. Co.

In Account With  
Heffernan Dry Dock Co.  
108 Railroad Avenue.

Balance

Apr. 29 Bill Rendered 3385.32 C.F.B.  
(Billhead of Heffernan Dry Dock Company)



Our No. 542

Seattle, Wash., April 29, 1911.

S. S. Rosalie and Owners.

Docking, cleaning and painting vessel.

Splitting out damaged stem and apron for entire length.

Removing planking on starboard side back to butts to allow  
of installing new stem and apron.

Removing and repairing stem iron.

Making, fitting and fastening new apron and hard wood stem.

Renewing planking removed.

Calking seam butts and wood ends.

Returning copper and replacing the missing parts with new  
cementing seams and painting new work with two coats as  
directed.

1st Day in Dock, 319 Tons.....	63.80	
5 Lay Days .....	250.00	313.80

## LABOR.

42 Hrs. Blacksmith .....	63.00	
1638½ Hrs. Carpenters .....	1228.90	
1465½ Hrs. Helpers .....	586.20	
48 Hrs. Calking .....	36.00	
		1914.10

## MATERIAL.

58# Sheet Lead .....	6.96
38' Iron Bark, 2½"x4½" .....	6.84
82 Wooden Wedges .....	3.28
1183' Iron Bark, 1"x2"-35' .....	212.94
4 Gals Black Paint .....	7.00
1 Gal White Paint .....	1.75
1 Gal Anti-Fouling Paint .....	2.10
20 Hrs. Dock Air .....	30.00
30' Ceiling, 1"x3" .....	1.20
96' Fir, #1 Clear, 8"x24"-6' .....	3.84
72' Fir, #1 Clear, 12"x6"-12' .....	2.88
256' Fir, #1, Clear, 8"x24"-16' .....	10.24
40# Soft Steel .....	2.40
1422' Fir, #1, 3"x12"-20' .....	56.88
2031' Fir, #1, 3"x12"-30' .....	81.24
84' Fir, #1, 6"x12"-14' .....	3.36
196' Iron Bark, 3"x8" .....	29.40
175# Iron, ½" .....	7.00
600' Timber, 20"x20"-18' .....	15.00
140' Fir, Merch., 10"x12"-14' .....	3.50
2 Rolls Felt .....	4.00
2 Bales Oakum .....	8.00
24 Gals Woolseys Copper Paint .....	42.00

1	Gal Von Hoveling #2 Paint.....	3.10	
	Stem Iron .....	240.00	
72#	C. S. Bolts .....	7.20	
430#	Galv Iron .....	30.10	
	Fittings .....	16.29	
34#	Red Lead .....	3.40	
450#	Galv Spikes .....	31.50	
1060#	Yellow Metal .....	233.20	
231#	Yellow Metal Nails .....	50.82	1157.42
			<hr/>
			3385.32

Seattle, Wash., Apr. 30 1911

THE INLAND NAVIGATION CO.

To Heffernan Dry Dock Co., Dr.

REQ. NO.

Repairs 3385.32

:  
: Received O.K. :  
: Prices O.K. :  
: Extensions O.K. E.P.P. :  
:

Total 3385.32

PLEASE DATE RECEIPT AND RETURN PROMPTLY  
DO NOT DETACH ANY PAPERS.

Received July 25th 1911 from THE INLAND NAVIGATION  
CO. Thirty-three hundred eighty five and 32/100 Dollars,  
in full for above claim as stated.

(Sig.) HEFFERNAN DRY DOCK Co.

By J. R. McLellan, Cashier.

THE INLAND NAVIGATION COMPANY

Voucher No. 4346

D.H.Nat.Check No.....

N.B.COM.Check No.21878

Month Apr 30 1911

Amount 3385.32/100

Name Heffernan Dry Dock Co.

Address Seattle, Wash.

Hull Repairs

ROSALIE

3385.32

(Endorsed:) Libelant's Ex. "B." Filed June 6, 1913. A.  
C. Bowman, U. S. Com. Filed in the U. S. District Court,  
Western Dist. of Washington, Northern Division. Aug. 18,  
1914.

FRANK L. CROSBY, *Clerk.*

By E. M. L., *Deputy.*

*Libelant's Exhibit "C":*

## STEAMER "ROSALIE" PAY ROLL MONTH APRIL 1911

Time other than for Regular Crew must be entered on separate roll and show plainly occupation of person employed.

	NAME	OCCUPATION	9	10	11	12	13	14	15	16	No. of Days	Wages Per Day or Month	Amount Due	These Columns are for Office use only	SIGNATURE
1	L. White.....	Dk. Watch.....								1 1/2					
2	J. D. Goss.....	Chf. Eng.....	1	1	1	1	1	1	1	1	8	40.00	.65		
3	J. D. Goss.....	Chf. Eng.....	Eight days board								8	1.00	8.00		
4	Wm. Kinsey.....	1st Asst.....	1	1	1	1	1	1	1	1	8	95.00	25.35		
5	Wm. Kinsey.....	1st Asst.....	Eight days board								8	.75	6.00		
6	Fred Goen.....	Fireman.....	1	1	1	1	1	1	1	1	8	50.00	13.35		
7	Fred Goen.....	Fireman.....	Eight days board								8	.60	4.80		
8	Hendry Hendricson.....	Fireman.....	1	1	1	1	1	1	1	1	8	50.00	13.35		
9	Hendry Hendricson.....	Fireman.....	Eight days board								8	.60	4.80		
10	C' Searles.....	Waiter.....	1	1	1						3	25.00	2.50		
11	L. Van Bogard.....	Watchman.....	1	1	1	1	1	1	1	1	8	60.00	16.00		
													<hr/>		
													\$130.80		

I certify this to be a true and correct copy of original payroll now on file.

C. A. CAWIE.

(Endorsed:) Libelant's exhibit "C". Filed June 6, 1913.

A. C. BOWMAN, U. S. Commissioner.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Aug. 18, 1914.

Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western  
District of Washington, Northern Division.  
In Admiralty.

STIMSON MILL COMPANY, A CORPORATION,	} No. 4730
<i>vs.</i>	
THE INLAND NAVIGATION COMPANY, A CORPORATION,	
	Appellant,
	Appellee.

*Stipulation as to Certain Exhibits.*

It is hereby stipulated, between the parties hereto, that the Clerk of this Court, in making up the apostles on appeal herein to the Circuit Court of Appeals for the Ninth Circuit, shall include therein and transmit therewith, as a part of said apostles on appeal herein, the originals of claimant's Exhibits "1" and "6."

Dated: June 7th, 1915.

HUGHES, McMICKEN, DOVELL & RAMSEY,  
*Proctors for Appellant.*  
BRONSON, ROBINSON & JONES,  
*Proctors for Appellee.*

(Endorsed.) Filed in the U. S. District Court, Western  
Dist. of Washington, Northern Division. June 7, 1915.  
Frank L. Crosby, Clerk, by E. M. L., Deputy.

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In the District Court of the United States for the Western  
District of Washington, Northern Division.  
In Admiralty.

STIMSON MILL COMPANY, A CORPORATION,	} No. 4730
<i>vs.</i>	
THE INLAND NAVIGATION COMPANY, A CORPORATION,	
	Appellant,
	Appellee.

*Order.*

Agreeably to the written stipulation between the parties hereto, this day filed herein, and it being in the opinion of the presiding Judge, undersigned, deemed proper that the Clerk of this Court in making up the apostles on appeal herein to the Circuit Court of Appeals for the Ninth Circuit shall include therein and transmit therewith as a part of the said

apostles on appeal herein the originals of claimant's Exhibits "1" and "6";

It is now by the undersigned, presiding Judge of said Court, ordered that said original Exhibits be sent up by the Clerk of this Court as part of the said apostles on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: June 7th, 1915.

JEREMIAH NETERER,  
*United States District Judge.*

O. K.  
BRONSON, ROBINSON & JONES.

(Endorsed:) Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 7, 1915.  
Frank L. Crosby, Clerk, by E. M. L., Deputy.

United States District Court, Western District of Washington, Northern Division.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	}	Libellant,
		<i>v.</i>
THE TOW BOAT "TILlicum," HER ENGINES, BOILERS,	}	No. 4730
Etc.,		
STIMSON MILL COMPANY, A CORPORATION,		
Claimant and Cross-Libellant.		Respondent,

Filed October 22, 1914.

*Libel and Cross-Libel for Damages from Collision. Both Vessels at Fault.*

Libellant cites the following authorities:

*The Ottawa*, 30 Wallace, 269, 18 L. Ed. 165, at 167;  
*The J. C. Ames*, 121 Fed. 918;  
*The Echo*, 131 Fed. 630;  
*The Hypodame*, 6 Wallace, 224, 8 L. Ed. 796;  
*The Cambridge*, F. C. #2, 334;  
*The Ancon*, F. C. #348;  
*The J. W. Everman*, F. C. #7, 591;  
*The Ant*, 10 Fed. 297;  
*The Excelsior*, 12 Fed. 200;  
*The Golden Grove*, 13 Fed. 691;



- McCabe v. Old Dominion S. S. Co.*, 31 Fed. 240;  
*The Man Lassett*, 34 Fed. 419;  
*Larsen v. The Myrtle*, 44 Fed. 781;  
*The St. Nicholas*, 49 Fed. 679;  
*City of Philadelphia v. Garagnin*, 62 Fed. 873;  
*The George W. Childs*, 67 Fed. 271;  
*The Livingstone*, 87 Fed. 777;  
*The Lansdowne*, 105 Fed. 441;  
*The Dauntless*, 129 Fed. 722;  
*The Tarpon*, 132 Fed. 278;  
*The Sitka*, 132 Fed. 864;  
*Bingham v. Luckenbach*, 140 Fed. 326;  
*Wilders S. S. Co. v. Low*, 112 Fed. 172;  
*The A. P. Skidmore*, 108 Fed. 972;  
*The Lyndhurst*, 92 Fed. 681;  
*The Elk*, 95 Fed. 846;  
*The Transfer No. 25*, 211 Fed. 965;  
30 Stat. L. 99 (Pilot Rule 16);  
*The Beaver*, 197 Fed. 866, at page 868;  
*The Pennsylvania*, 19 Wallace, 125; 22 L. Ed. 151;  
*The Arthur W. Palmer*, 115 Fed. 417;  
*The Governor*, F. C. 5645;  
*The Whitney*, F. C. 17, 586;  
*The Dorchester*, 121 Fed. 889;  
*The Samuel Dillaway*, 98 Fed. 138, at 142;  
*The North Point*, 205 Fed. 958;  
*The Ludwig Holberg*, 157 U. S. 62, 39 L. Ed. 620;  
*The Teaser*, 127 Fed. 305;  
*Taylor v. Harwood*, F. C. 13, 294;  
*The Umbria*, 166 U. S. 404; 41 L. Ed. 1053;  
*The H. B. Ranson*, 152 Fed. 1001;  
*The Livingstone*, 113 Fed. 879;  
*The Ashbourne*, 181 Fed. 815;  
*The Baltimore*, 8 Wall. 377, 19 L. Ed. 463;  
*The John H. Starin*, 116 Fed. 443;  
*Coffin v. The Osceola*, 34 Fed. 921;  
*New Haren Steam Boat Co. v. The Mayor*, 36 Fed. 717;  
*The State of California*, 54 Fed. 406;  
*The Favorita*, F. C. 4, 694 Aff 18 Wall. 598, 21 L. Ed. 856;  
*The Cayuga*, F. C. 2537;  
*The Providence*, 98 Fed. 133;  
*Williamson v. Barrett*, 13 How. 101, 14 L. Ed. 68;  
*Harris v. The Prometheus*, F. C. 6, 127;  
*The Morning Star*, F. C. No. 9817;  
*Cambia S. S. Co. v. Pittsburg S. S. Co.*, 212 Fed. 674.

Claimant and Cross-Libelant cites the following authorities:

- Quinette v. Bisso*, 136 Fed. 832;  
 Article 16, International Rules;  
*The Louisiana*, 2 Benedict, 371;  
*The Luray*, 24 Fed. 751;  
*The Umbria*, 166 U. S. 404;  
*The Martello*, 153 U. S. 70;  
*The Providence*, 98 Fed. 132;  
*The Niagara*, 77 Fed 329;  
*The Oceania Vance* (No. 4046, recently decided by this Court);  
 Rule II, Article 18, International Admiralty Rules;  
*The Providence*, 98 Fed. 134;  
*The H. F. Dimock*, 77 Fed. 230;  
*The Pennsylvania*, 19 Wall. 125, 136;  
*The Britannia*, 153 U. S. 130, 143;  
*The Beaver*, 197 Fed. 869;  
*The Sicilian Prince*, 128 Fed. 133;  
*The Tillie*, 13 Blatch, 514;  
*The Singapore*, 1 L. R. P. C. 381;  
*The Pocomoke*, 150 Fed. 197;  
 Rule 38 of Rules and Regulations of Board of Supervising Inspectors, Rev. Stat. 4405;  
*The Ping-on v. Blethen*, 11 Fed. 607;  
*McFarland et al. v. Selby Smelting & Lead Co.*, 17 Fed. 253;  
*The Caro*, 23 Fed. 735;  
*The Ship Shakespeare*, 4 Benedict, 128;  
*The Steamer Hansa*, 5 Benedict, 501;  
*Meigs & Talbot v. Steamship Northerner*, 1 Wash. Ty. 87;  
*Jacobsen v. Dalles P. & A. Nav. Co.*, 106 Fed. 428;  
*The North Point*, 205 Fed. 958;  
*The Ludvig Holberg*, 157 U. S. 60, 71;  
*The Transfer No. 8*, 96 Fed. 253;  
*The Chicago*, 125 Fed. 716;  
*The Ashbourne*, 181 Fed. 815.

Bronson & Robinson, for Libelant.

Hughes, McMicken, Dovell & Ramsey, for Claimant and Cross-Libelant.

NETERER, District Judge:

The Steamship "Rosalie," a vessel of 318.51 gross tonnage, bound from Bellingham to Seattle, at about 5:15 a. m. on the 8th day of April, 1911, collided with the Tow Boat "Tilli-

cum," a vessel of 116 tons and 87 feet in length, while proceeding from the Standard Oil Dock in Seattle, to Ballard. The "Tillicum" had lashed to her side a barge, 28 feet wide and 100 feet long, on which was loaded two oil tank cars. The "Rosalie" was owned by the Inland Navigation Company, a corporation, and the tow-boat "Tillicum" by the Stimson Mill Company. A libel and a cross-libel were filed by the respective parties to recover the damages sustained to their respective vessels. A dense fog prevailed in the vicinity of the place of collision. The usual speed of the "Rosalie" was about  $9\frac{1}{2}$  knots per hour. She passed West Point Light-house about 5:05 a. m. At that time a very light fog prevailed, and the light at West Point was plainly visible. She was giving her regular fog signals, one prolonged blast of her whistle, at the usual intervals. About three minutes after passing West Point her lookout reported one whistle on the port bow, which was also heard by the mate then on duty in the pilot-house. The engine was stopped and the vessel drifted about a minute, and hearing no further response to her whistle she started ahead. Then another whistle was heard, followed by a danger signal from the tug-boat, which was answered by a like signal from the "Rosalie." At this time the lights were seen a short distance ahead. The "Rosalie," after giving the signal to go ahead, almost instantly gave the order to reverse. The tug "Tillicum" proceeded on her course in a thick fog which was prevailing. She gave her fog signals at the regular intervals, and as she proceeded along under Magnolia Bluff in the vicinity of Four Mile Rock she slowed down to about three miles an hour and endeavored to locate her position by the echoes from the bluff. After proceeding at this speed for about five minutes, having heard no whistle from other vessels, she got an echo of a long whistle from some object ahead of her. She immediately stopped her engine and drifted until her next whistle was given, when the echo from ahead was repeated and also a danger signal immediately followed, and her engine was thereupon reversed. While the vessels were in this position, the collision occurred. At the time of the collision, A. W. Anderson was master and pilot of the tug-boat. Captain Charlesworth was acting as lookout from the pilot-house. The scow's bow was from 12 to 30 feet forward of the bow of the tug. The bow of the tug was at least 12 feet forward of the pilot-house.

It is contended on the part of libelant that because the tug "Tillicum" had no lookout and because she did not stop and reverse in time, and because she was carelessly navigating,

she is liable for the damage which was occasioned; while it is contended by the claimant and cross-libellant that the "Rosalie" was at fault: First, In navigating at an excessive rate of speed; Second, In navigating without due caution after hearing a steam vessel forward of her beam, whose course and position were not ascertained, and, Third, in failing to give proper signals when it became apparent that the course and intention of the vessel approaching was not understood. The claimant urges that while it did not have a lookout upon the bow of the tug, that the better point of observation was in the pilot-house, and that even though the pilot rules would ordinarily require the lookout to be on the bow of the boat, yet the custom in the operation of tug boats in and about the waters in which the collision occurred is for the lookout to be stationed just forward of the pilot-house, or in the pilot-house.

It is immaterial what the custom in the operation of the boats is, if the custom is contrary to the law. If a custom could obtain over the law, navigators could very readily overcome an act of Congress by agreeing upon a rule and adhering to it for such a time as to develop a custom. Such cannot be the law.

"The statement that it is not customary for tugs to maintain a more vigilant lookout than this tug had is immaterial. The law determines their duty in this respect and they cannot avoid it without becoming responsible for the consequences."

*(The George W. Childs, 67 Fed. 72.)*

It has, in admiralty, long been the established rule of due care that vessels navigating in a fog or in the night-time shall have a competent lookout.

"Steamers are required to have constant and vigilant lookouts stationed in proper places on the vessel and charged with the duty for which lookouts are required, and they must be actually employed in the performance of the duty to which they are assigned. They must be persons of suitable experience, properly stationed on the vessel and actually and vigilantly employed in the performance of that duty. Proper lookouts are competent persons other than the master and helmsman, properly stationed for that purpose on the forward part of the vessel, and the pilot-house, in the night-time, especially if it is very dark and the view is obstructed, is not the proper place."

*(The Ottawa, 3 Wallace, 269.)*



A lookout is a person who is specially charged with the duty of observing the lights, the sounds, the echoes, or any obstruction to navigation, with that thoroughness which the circumstances admit; his sole duty must be that with which he is charged, and he cannot divide this responsibility with the duties of master or those of any other person about the ship. *The J. C. Ames*, 121 Fed. 918; and it is the duty of the courts charged with admiralty jurisdiction to give the fullest effect to such duty when the circumstances are such as to call for its application, and every doubt as to the performance of the duty or the effect of non-performance, should be resolved against the vessel in the fault, until the contrary is shown by the testimony. *The Ariadne*, 13 Wallace, 475; *Wilders Steamship Co. v. The Low*, 112 Fed. 172; *The Hypodame*, 6 Wall. 216, 12 How. 443.

Rule 38 of the General Rules and regulations prescribed by the Board of Supervising Inspectors, authorized under Rev. Stat., Section 4405, provides:

"All passenger and ferry steamers shall, in addition to the regular pilot on watch, have one of the crew also on watch in or near the pilot-house, and this rule applies to all steamers navigating in the night-time."

This rule, it is contended, applies to the instant case, and that under it no question could arise as to the sufficiency of the lookout.

Article 29 of the regulations for preventing collisions upon harbors, rivers and inland waters, 30 Stat. at Large, page 102, provides:

"Nothing in these rules shall exonerate any vessel or the owners or masters or crew thereof, from the consequences of any neglect to keep a proper lookout, or the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

I do not think that it can be seriously contended that it was intended to supersede the long established admiralty rule requiring a competent lookout and that he shall be placed in the forward part of a forward moving vessel, and the adoption of Art. 29 by Congress would seem to remove all doubt. The further contention that a person could see and hear better from the pilot-house because of its elevated position than from the bow of the vessel, I think, is answered by the testimony in this case, which shows that the fog was general. If the testimony should disclose that the fog bank lay near the water and that the pilot-house extended above the fog, the contention might have some force; but under the



testimony, the court must find that a person could see no farther into the fog twelve or fifteen feet above the water than he could four or six feet. The bow of the scow being some distance forward of the bow of the boat, placed the master when in the pilot-house at least twenty-four feet back from the bow of the scow, and possibly forty-two feet, depending upon the testimony adopted as correct, and the court cannot say that in a dense fog such as this was, that the lookout could have a better point of observation from the pilot house than from the bow of the boat. I think that in the towing of this scow, the lookout should have been stationed as far forward on the sailing craft as possible. The tug with its tow was a craft capable of committing injuries and its size or shape can make no exception to the rule requiring a lookout.

"If tugs will go about the harbor without lookouts, they may not expect that the court will conjecture nicely what would have happened if the lookout had been in his place doing his duty when the collision occurred."

*(The Arthur M. Palmer, 115 Fed. 417.)*

The safety of life and property requires that a tug in towing a scow in the manner shown with the bow of the scow from twelve to thirty feet forward of the bow of the tug, in a dense fog, must have a lookout stationed farther forward than in the pilot-house on the tug. In a dense fog a short distance to the eye or ear may mean much, and a few feet might save many lives or much property. Courts must, therefore, in a harbor where many vessels may be afloat, rigidly enforce the safety provisions of law or admiralty rules.

Article 16 of regulations for sailing crafts upon inland waters, 30 Stat. at Large, page 99, provides:

"A steam vessel hearing apparently forward of her beam the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and navigate with caution until the danger of collision is over."

I think it may be fairly assumed that the claimant, when it heard the echo of the object forward, did stop its engine and navigate with caution, but I am not prepared to say that the echo was heard or the engine stopped and reversed in time to stop the forward motion of the tug. The libellant, upon hearing the whistle, immediately stopped its engine and proceeded with caution, but I think was not warranted, under the circumstances, in starting forward again at the time that it did without first locating the whistle that had been heard.

*The Hypodame*, 6 Wall., 216; and while the forward motion was only three or four revolutions of the engine, yet it was of sufficient force to add to the momentum which the *Rosalie* then had to the speed that had been given prior to the stopping of the engine, and the reversing of the engine after the alarm signal was given was too late to stop the forward movement of the boat prior to the collision. I believe, from the testimony in this case, that the engines of both crafts were reversed, but that they had not operated for a sufficient length of time to stop the forward movement of either of the crafts, and that both boats were still going forward at the time of the collision.

"The liability for damage is upon the ship or ships whose fault causes the injury, but when, as in this case, a ship at the time of the collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributing cause to the disaster. In such a case the burden rests upon the ship to show, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

(*The Pennsylvania*, 19 Wallace, 125).

This rule applies where a proper lookout is not provided. *The George W. Childs*, *supra*; *The Arthur M. Palmer*, *supra*; *McCabe v. Old Dominion Steamship Co.*, 31 Fed. 253; *The Lydhurst*, 92 Fed. 681; as well as violations of other recognized rules of navigation.

"It is claimed that even if the *Selja* was at fault in not obeying Rule 16, such fault was not a contributing cause of the collision. The law is that she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so."

(*The Beaver*, 197 Fed. 866).

Both of these vessels were moving vessels. I think both were at fault. The "*Tillicum*" did not have a proper lookout, and the "*Rosalie*" did not navigate with due caution after hearing a steam vessel forward of her beam. Both vessels having violated recognized rules of navigation, and not having shown that such fact did not contribute to the disaster, must be held to have contributed to the collision.

The damage to the "*Rosalie*" is shown to be \$5116.12; to the "*Tillicum*" and scow, \$597.30, a total loss of \$5713.42, which should be equally divided. A decree may be presented

for libelant in the sum of \$2856.71; each party to pay one-half the costs.

JEREMIAH NETERER, *Judge.*

Endorsed: Filed in the U. S District Court, Western Dist. of Washington, Northern Division. Oct. 22, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

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United States District Court, Western District of Washington,  
Northern Division.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	}	Libelant,
		<i>vs.</i>
THE TOW BOAT "TILLICUM", HER ENGINES, BOILERS,	}	Respondent,
etc.,		
STIMSON MILL COMPANY, A CORPORATION,	}	No. 4730
Claimant and Cross-Libelant.		

*Final Decree.*

This cause having been duly referred to a Commissioner; and the testimony taken by him returned into Court, and argument had thereon; and the Court, after due deliberation, having filed its memorandum decision on October 22d, 1914, in which the Court found and now finds that both parties were at fault and the damages to the "Rosalie" were shown to be \$5116.12, and to the "Tillicum" and scow \$597.30, a total loss of \$5713.42, which should be equally divided, and a decree presented for libelant in the sum of \$2856.71, each party to pay one-half of the costs;

NOW, THEREFORE, it is hereby Ordered, Adjudged and Decreed that the libelant, Inland Navigation Company, a corporation, have and recover of and from the Stimson Mill Company, a corporation, and from C. D. Stimson and Thomas D. Stimson, sureties on the stipulation filed herein for the release of the respondent vessel, the said sum of \$2856.71, together with such costs, if any, as the libelant shall have been found to have lawfully taxed in excess of one-half of the entire cost of this cause, when the same shall have been taxed; and

IT IS FURTHER ORDERED that unless an appeal be taken from this decree within the time limited by the rules and practice of this court, and unless the said Stimson Mill Company, a corporation, and the said C. D. Stimson and Thomas

D. Stimson, stipulators on the release bond of the said Tug "Tillicum" given herein, do cause the engagement of their said stipulation to be performed within the time provided by law and the rules of this court, or on the first day of jurisdiction thereafter, that the said stipulators shall show cause why execution should not issue against them, their lands, goods, and chattels for the amount of this decree, according to their said stipulation.

ORDERED AND DECREED this 26th day of October, 1914.

JEREMIAH NETERER,  
*United States District Judge.*

Approved as to form:

E. C. H.,  
*Proctors for Claimant and Cross-libelant.*

Endorsed: Final Decree. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 26, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

In the District Court of the United States for the Western  
District of Washington, Northern Division.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	} Libelant,	} No. 4730
<i>vs.</i>		
THE TOW BOAT "TILlicum", HER ENGINES, BOILERS,	} Respondent,	
etc.,		
STIMSON MILL COMPANY, A CORPORATION,		
Claimant and Cross-Libelant.		

In Admiralty.

*Memorandum of Claimant and Cross-Libelant's Costs and Disbursements.*

To the Clerk of the Above Entitled Court:

You will please tax the following costs and disbursements in favor of the claimant and cross-libelant, Stimson Mill Company, and against the libelant, The Inland Navigation Company, a corporation, viz:

Clerk's fees .....	\$ 14.10
Marshal's fees .....	5.12
United States Commissioner's fees.....	53.50
Proctor's fees .....	20.00



## Witness fees:

E. W. Charlesworth,	3 days & mileage.....	9.60	
A. W. Anderson,	2 " " " .....	6.40	
W. A. Rause,	1 day " " .....	3.20	
E. T. Connell,	1 " " " .....	3.20	
Hans Nederlie,	1 " " " .....	3.20	
Andrew M. McKay,	2 days " " .....	6.40	
N. H. Jacoby,	1 day " " .....	3.20	
Fred McFarland,	1 " " " .....	3.20	
Matthew H. Sandstrom,	1 " " " .....	3.20	
John L. Hubbard,	1 " " " .....	3.20	
Charles Redmond,	1 " " " .....	3.20	
Charles Martin,	1 " " " .....	3.20	
R. A. Turner,	1 " " " .....	3.20	
L. E. Smith,	1 " " " .....	3.20	
J. C. Ackles,	1 " " " .....	3.20	
I. H. Biggs,	1 " " " .....	3.20	\$ 64.00
			<hr/>
			\$156.72

HUGHES, McMICKEN, DOVELL & RAMSEY,  
*Proctors for Claimant and Cross-Libelant.*

UNITED STATES OF AMERICA,

WESTERN DISTRICT OF WASHINGTON.

} ss.

H. J. RAMSEY, being duly sworn, deposes and says: That he is one of the Proctors for Claimant and Cross-Libelant in the above entitled cause; and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause and that the services charged herein have been actually and necessarily performed as herein stated.

H. J. RAMSEY.

Subscribed and sworn to before me this 24th day of October, A. D. 1914.

[SEAL]

JOHN P. GARVIN,  
*Notary Public in and for the State of  
 Washington, residing at Seattle.*

Copy of within Cost Bill received, and due service of same acknowledged this 26th day of October, 1914.

BRONSON & ROBINSON,  
*Proctors for Libelant.*



Endorsed: Memorandum of Claimant and Cross-Libellant's Costs and Disbursements. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 26, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States of America.

District Court of the United States, Ninth Circuit, Western District of Washington.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	} Libellant,	} No. 4730
vs.		
THE TOW BOAT "TILlicum,"	} Respondent,	
etc.,		
STIMSON MILL COMPANY, A CORPORATION,		
Claimant and Cross-Libellant.		

*Memorandum of Costs and Disbursements to Be Taxed Against Claimant.*

DISBURSEMENTS.

	Amount Claimed	Amount Allowed
Clerk's Fees .....	\$ 22.00	\$ 22.00
Marshal's Fees .....	2.50	2.50
Attorney's Fees .....	20.00	20.00
Commissioner's Fees .....	48.50	48.50
Witness Fees:		
L. Bougojard, Seattle, Wn., 1 day, 2 miles	3.20	3.20
A. Hanson, Seattle, Wn..... " "	3.20	3.20
W. L. Kinsey, Seattle, Wn., " "	3.20	3.20
Harry Gates, Seattle, Wn., " "	3.20	3.20
H. M. Hendrickson, Seattle, Wn. .... " "	3.20	3.20
Joshua Green, Seattle, Wn., " "	3.20	3.20
James Fowler, Seattle, Wn., " "	3.20	3.20
C. H. J. Stoltenberg, Seattle, Wn. .... " "	3.20	3.20
Frank Walker, Seattle, Wn., " "	3.20	3.20
David Hollywood, Seattle, Wn. .... " "	3.20	3.20
Total .....	\$125.00	

Taxed October, 1914.

*Clerk.*

UNITED STATES OF AMERICA, }  
WESTERN DISTRICT OF WASHINGTON. } ss.

J. S. ROBINSON, being duly sworn, deposes and says: That he is the Proctor for the Libelant in the above entitled cause; and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause and that the services charged herein have been actually and necessarily performed as herein stated.

J. S. ROBINSON.

Subscribed and sworn to before me, this 23d day of October, 1914.

W. L. GRILL,  
*Notary Public in and for the State of Washington,  
residing at Seattle, King County, Therein.*

To Hughes, McMicken, Dovell & Ramsey,  
Proctors for Claimant and Cross-Libelant,  
Seattle, Washington.

You will please take notice that on Monday, the ..... day of October, 1914, at the hour of ..... o'clock ..... M., application will be made to the Clerk of said Court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said Court, in such case made and provided.

BRONSON & ROBINSON,  
*Proctors for Libelant.*

Due service of the within and foregoing Memorandum of Costs and Disbursements and notice of the taxation thereof by the receipt of a true copy thereof, hereby is admitted in behalf of all parties entitled to such service by the Rules of Court, this Oct. 23, 1914.

HUGHES, McMICKEN, DOVELL & RAMSEY,  
*Proctors for Claimant and Cross-Libelant.*

Endorsed: Memorandum of Costs and Disbursements. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 26, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

In the District Court of the United States for the Western  
District of Washington, Northern Division.  
In Admiralty.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	}	Libelant,
<i>vs.</i>		
THE TOW BOAT "TILlicum", HER ENGINES, BOILERS,	}	No. 4730
etc.,		
STIMSON MILL COMPANY, A CORPORATION,	}	Respondent,
Claimant and Cross-Libelant.		

*Notice of Appeal.*

To the Clerk of the above entitled Court, and to the above  
named Libelant, The Inland Navigation Company, a cor-  
poration, and to Bronson & Robinson, its Proctors:

Comes now the Stimson Mill Company, a corporation,  
claimant and cross-libelant herein, and hereby appeals to  
the United States Circuit Court of Appeals for the Ninth  
Circuit, from the judgment and decree, and the whole thereof,  
rendered and entered in the above entitled cause on the 26th  
day of October, 1914.

Dated this 22d day of April, 1915.

HUGHES, McMICKEN, DOVELL & RAMSEY,  
*Proctors for Stimson Mill Company,*  
*Claimant & Cross Libelant.*

Endorsed: Notice of Appeal. Filed in the U. S. District  
Court, Western Dist. of Washington, Northern Division. Apr.  
22, 1915. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.

In the District Court of the United States for the Western  
District of Washington, Northern Division.  
In Admiralty.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	}	Libelant,
<i>vs.</i>		
THE TOW BOAT "TILlicum", HER ENGINES, BOILERS,	}	No. 4730
etc.,		
STIMSON MILL COMPANY, A CORPORATION,	}	Respondent,
Claimant and Cross-Libelant.		

*Acceptance of Service.*

The Inland Navigation Company, libelant herein, hereby  
acknowledges due and proper service of the claimant and

cross-libelant's notice of appeal in the above entitled matter this 22d day of April, after the filing of the original of said notice of appeal in the office of the clerk of the District Court of the United States for the Western District of Washington, Northern Division.

BRONSON, ROBINSON & JONES,  
*Proctors for said Libelant.*

Endorsed: Acceptance of Service. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 22, 1915. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.

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In the District Court of the United States for the Western  
District of Washington, Northern Division.  
In Admiralty.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	}	Libelant,
		<i>vs.</i>
THE TOW BOAT "TILlicum", HER ENGINES, BOILERS,	}	No. 4730
etc.,		
STIMSON MILL COMPANY, A CORPORATION,		
Claimant and Cross-Libelant.		Respondent,

*Order Allowing Appeal.*

On motion for the proctors for the claimant and cross libelant herein, it appearing to the Court that a notice of appeal from the judgment and decree of the Court herein having been duly filed, it is hereby ORDERED that the said appeal be and it is hereby allowed.

Done in open Court this 22d day of April, A. D. 1915.

JEREMIAH NETERER, *Judge.*

Endorsed: Order Allowing Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 22, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

In the District Court of the United States for the Western  
District of Washington, Northern Division.  
In Admiralty.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	}	No. 4730
Libelant,		
<i>vs.</i>		
THE TOW BOAT "TILlicum", HER ENGINES, BOILERS,	}	
etc.,		
STIMSON MILL COMPANY, A CORPORATION,	}	
Claimant and Cross-Libelant.		

*Bond for Costs on Appeal.*

Know All Men by These Presents:

That we, the Stimson Mill Company, a corporation, claimant and cross libelant in the above entitled cause, as principal, and J. F. Ives and Thos. D. Stimson, as sureties, are held and firmly bound unto The Inland Navigation Company, a corporation, libelant herein, in the sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said obligee, to which payment, well and truly to be made, we hereby bind ourselves, our heirs, successors, administrators and assigns, jointly and severally, firmly by these presents.

Signed, sealed and dated at Seattle this 22nd day of April, A. D. 1915.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT

WHEREAS, on the 26th day of October, 1914, at a District Court of the United States for the Western District of Washington, Northern Division, in the above entitled cause, a decree was entered against the above named claimant and cross libelant and its stipulators, from which decree the said claimant and cross libelant has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit;

NOW, THEREFORE, if the said claimant and cross libelant, as such appellant, shall prosecute its appeal to effect, and pay the costs if the appeal is not sustained, then this obligation shall be void, otherwise to be and remain in full force and effect, and execution issue thereon for the amount of said costs, not exceeding Two Hundred Fifty (\$250.00) Dollars, at the instance of any person interested as aforesaid.

STIMSON MILL COMPANY,

*Claimant and Cross Libelant.*

By HUGHES, McMICKEN, DOVELL & RAMSEY,

*Its Proctors.*

J. F. IVES.

THOS. D. STIMSON.



UNITED STATES OF AMERICA, }  
 WESTERN DISTRICT OF WASHINGTON. } ss.

J. F. IVES and THOS. D. STIMSON, being duly sworn, deposes and says each for himself, that he is a resident of the Western District of Washington, Northern Division, that he is worth the sum of Two Hundred Fifty Dollars (\$250.00), over and above all his just debts and liabilities.

J. F. IVES,  
 THOS. D. STIMSON.

Subscribed and sworn to before me this 22nd day of April, 1915.

[SEAL]

E. B. BRYNER,  
*Notary Public in and for the State of  
 Washington, residing at Seattle.*

The within and foregoing bond for costs on appeal herein is hereby approved.

Dated at Seattle, Washington, this 22 day of April, 1915.

JEREMIAH NETERER, *Judge.*

The Inland Navigation Company, a corporation, libellant herein, hereby waives notice of the filing of the foregoing bond and assents to the sufficiency of the sureties thereon.

Dated, April 22, 1915.

BRONSON, ROBINSON & JONES,  
*Proctors for said Libellant.*

Endorsed: Bond for Costs on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 22, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

In the United States Circuit Court of Appeals for the Ninth  
 Circuit.  
 In Admiralty.

STIMSON MILL COMPANY, A CORPORATION,	}	Appellant,	}
vs.			
THE INLAND NAVIGATION COMPANY, A CORPORATION,	}	Appellee.	} No. ....

*Citation on Appeal.*

THE UNITED STATES OF AMERICA, }  
WESTERN DISTRICT OF WASHINGTON. } ss.  
NORTHERN DIVISION. }

The President of the United States of America to The Inland Navigation Company, a corporation, appellee herein,  
GREETING :

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals to be holden at the City of San Francisco, California, in and for the Ninth Circuit, within thirty (30) days from the date hereof, pursuant to an appeal of the appellant herein, from a decree of the United States District Court for the Western District of Washington, Northern Division, in a certain cause in admiralty, wherein The Inland Navigation Company, a corporation, is libelant, and The Tow Boat "Tillicum", her engines, boilers, etc., respondent, and Stimson Mill Company, a corporation, claimant and cross libelant, to show cause, if any you have, why the decree rendered against the claimant and cross libelant in said cause, as in said decree mentioned, should not be corrected and why speedy justice should not be shown the parties in that behalf.

WITNESS THE HONORABLE EDWARD D. WHITE, Chief Justice of the United States, the 22d day of April, 1915, and the Independence of the United States the One Hundredth and Thirty-ninth.

[DIST. COURT SEAL]

JEREMIAH NETERER,

*Judge of the District Court of the United States for  
the Western District of Washington, Northern Division.*

Endorsed: Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 22, 1915. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In Admiralty.

STIMSON MILL COMPANY, A CORPORATION,	Appellant,	No. ....
vs.		
THE INLAND NAVIGATION COMPANY, A CORPORATION,	Appellee.	

*Admission of Service.*

The appellee herein, The Inland Navigation Company, a corporation, admits service this 22nd day of April, 1915, of

BRONSON, ROBINSON & JONES.

*Proctors for The Inland Navigation Company, Appellee.*

Endorsed: Admission of Service. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 10, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western  
District of Washington, Northern Division.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	<i>vs.</i>	STIMSON MILL COMPANY, A CORPORATION,
Libelant,		Claimant and Cross-Libelant.
		Respondent,
THE TOW BOAT "TILlicum", HER ENGINES, BOILERS, etc.,		No. 4730

### Assignments of Error.

Now comes the Stimson Mill Company, a corporation, Claimant of the above named Tow Boat "Tillicum", her engines, boilers, etc., and Cross-Libelant, and by its proctors, Hughes, McMicken, Dovell & Ramsey, shows that in the records and proceedings in said cause and in the final decree entered therein there is manifest error in the following particulars:

FIRST.—The court erred in holding that the Tow Boat "Tillicum" was at fault for not having an additional lookout stationed at her bow.

SECOND.—The court erred in holding that the lookout maintained by the Tow Boat "Tillicum" in her pilot house was not a proper and sufficient lookout.

THIRD.—The court erred in holding that the Tow Boat "Tillicum" and her barge had not overcome their forward motion at and prior to the collision of the "Rosalie" therewith.

FOURTH.—The court erred in holding that the Tow Boat "Tillicum" and her barge were not making sternway at the time of the collision.

FIFTH.—The court erred in holding that the failure of the "Tillicum" to maintain a lookout at her bow was a fault contributing to the collision.

SIXTH.—The court erred in holding that the improper navigation of the steamship "Rosalie" was not the sole cause of said collision.

SEVENTH.—The court erred in refusing to hold that the burden of proof was upon the "Rosalie" to show that her fault was not the sole cause of said collision.

EIGHTH.—The court erred in finding and decreeing that damages should be divided.

NINTH.—The court erred in finding the damages sustained by the "Rosalie" were grossly in excess of her actual damage.

TENTH.—The court erred in refusing to award to the Cross-Libelant its full damages and costs.

HUGHES, McMICKEN, DOVELL & RAMSEY,  
*Proctors for Appellant.*

Copy of within Assignments of Error received, and due service of same acknowledged this 4th day of June, 1915.

BRONSON, ROBINSON & JONES,  
*Proctors for Libelant.*

(Endorsed:) Assignments of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 7, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

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In the District Court of the United States for the Western  
District of Washington, Northern Division.  
In Admiralty.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	}	Libelant,
vs.		
THE TOW BOAT "TILlicum", HER ENGINES, BOILERS,	}	No. 4730
etc.,		
STIMSON MILL COMPANY, A CORPORATION,		
Claimant and Cross-Libelant.		

*Stipulation as to Record.*

IT IS HEREBY STIPULATED, between the parties hereto, that the apostles on appeal herein to the Circuit Court of Appeals for the Ninth Circuit shall include the following:

Libel, filed October 5, 1911;

Claim of Stimson Mill Co., filed October 6, 1911;

Bond to United States Marshal for release of vessel,  
filed October 6, 1911;

Answer and Cross-libel, filed April 13, 1912;

Claim by President of owner, filed April 16, 1912;

Bond to obtain release of vessel arrested under cross-libel, filed April 16, 1912;

Answer to cross-libel, filed January 24, 1913;



Order of reference, filed December 30, 1912;  
Testimony, with certificate, filed August 18, 1914;  
Motion for leave to take further testimony, filed September 2, 1914;  
Order granting leave to take further testimony, filed September 8, 1914;  
Further testimony, with certificate, filed Sept. 17, 1914.  
Claimant's Exhibits "1", "2", "3", "4", "5", "6", and "7";  
Libelant's Exhibits "A", "B" and "C";  
Stipulation as to Claimant's Exhibits "1" and "6", filed June 7th, 1915;  
Order as to Claimant's Exhibits "1" and "6", filed June 7th, 1915;  
Opinion, filed October 22, 1914;  
Decree, filed October 26, 1914;  
Memorandum of costs of claimant and cross-libelant, filed October 26, 1914;  
Memorandum of costs of libelant, filed October 26, 1914;  
Notice of appeal, filed April 22, 1915;  
Acceptance of service of notice of appeal, filed April 22, 1915;  
Order allowing appeal, filed April 22, 1915;  
Bond for costs on appeal, filed April 22, 1915;  
Citation on appeal, filed April 22, 1915;  
Admission of service of citation, filed May 10, 1915;  
Assignment of Errors, filed June 7, 1915;  
This Stipulation, filed June 7th, 1915;

which comprise all the papers, exhibits, depositions and other proceedings which are necessary to the hearing of said cause upon appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, and that no other paper or proceeding than those above mentioned need be included by the Clerk of the United States District Court for the Western District of Washington, Northern Division, in making up the said apostles on appeal herein.

Dated: June 7, 1915.

HUGHES, McMICKEN, DOVELL & RAMSEY,  
*Proctors for Appellant.*

BRONSON, ROBINSON & JONES,  
*Proctors for Appellee.*

Endorsed: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 7, 1915.  
Frank L. Crosby, Clerk, by E. M. L., Deputy.



In the District Court of the United States for the Western  
District of Washington, Northern Division.

THE INLAND NAVIGATION COMPANY, A CORPORATION,	}	No. 4730
Libellant,		
<i>vs.</i>		
THE TOW BOAT "TILlicum," HER ENGINES, BOILERS,	}	
etc.,		
Respondent,		
STIMSON MILL COMPANY, A CORPORATION,	}	
Claimant and Cross-Libellant.		

*Certificate of Clerk U. S. District Court to Apostles, Etc.*

*United States of America,* } *ss.*

*Western District of Washington,* }

I, FRANK L. CROSBY, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 210 pages, numbered from 1 to 210, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on appeal to the said Circuit Court of Appeals for the Ninth Circuit from the District Court of the United States for the Western District of Washington.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the claimant and appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's Fee (Sec. 828 R. S. U. S.) for making record,	
certificate of return, 660 folios at 15c.....	\$ 99.00
Certificate of Clerk to transcript of record, 4 folios at	
15c .....	.60
Seal to said Certificate.....	.20
Certificate of Clerk to Original Exhibits, 3 folios at 15c....	.45
Seal to said Certificate.....	.20
Statement of cost of printing said transcript of record,	
collected and paid.....	219.00
<b>Total .....</b>	<b>\$319.45</b>

I hereby certify that the above cost for preparing and certifying record, amounting to \$319.45, has been paid to me by Messrs. Hughes, McMicken, Dovell & Ramsey, Proctors for Claimant and Appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 18th day of June, 1915.

(Seal)

FRANK L. CROSBY,  
Clerk United States District Court.

No. 2616

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

STIMSON MILL COMPANY, a corporation, Claimant of the  
Tow Boat "Tillicum," her Engines, Boilers, Tackle, Apparel  
and Furniture,

Appellant,

vs.

THE INLAND NAVIGATION COMPANY, a corporation,  
Claimant of the Steamer "Rosalie," her Tackle, Apparel and  
Furniture,

Appellee.

Upon Appeal from the United States District Court  
for the Western District of Washington,  
Northern Division.

**BRIEF AND ARGUMENT OF APPELLANT**

HUGHES, McMICKEN, DOVELL & RAMSEY,

Proctors for Appellant.

660-671 Colman Building  
Seattle, Washington



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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STIMSON MILL COMPANY, a corporation, Claimant of the  
Tow Boat "Tillicum," her Engines, Boilers, Tackle, Apparel  
and Furniture,

Appellant,

vs.

THE INLAND NAVIGATION COMPANY, a corporation,  
Claimant of the Steamer "Rosalie," her Tackle, Apparel and  
Furniture,

Appellee.

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Upon Appeal from the United States District Court  
for the Western District of Washington,  
Northern Division.

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**BRIEF AND ARGUMENT OF APPELLANT**

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STATEMENT.

This controversy arises upon the libel of The Inland Navigation Company, owner of the steamship "Rosalie," against the tug "Tillicum," and upon the cross-libel of the Stimson Mill Company as owner of the tug, growing out of a collision which occurred



about a mile southeast of West Point lighthouse between the steamship "Rosalie" and a barge which was towed on the port side of the tug "Tillicum" in the early morning of April 8, 1911, and while a thick fog prevailed in the vicinity of the place of collision.

The "Rosalie," a freight and passenger boat plying between the ports of Bellingham and Seattle, was making her regular night trip southward from Bellingham to Seattle. Her usual speed while making this trip is about nine and one-half knots per hour (Apostles, pp. 41, 42, 43). She passed West Point light at 5:05 A. M. (Apostles, pp. 32, 39.) At that time a haze or very light fog was prevailing and the light at West Point was visible. She claims to have been giving her regular fog signal, one prolonged blast of her whistle, at the usual intervals. About three minutes after passing West Point light her lookout reported one whistle on the port bow (Apostles, p. 19), which was also heard by the mate then on duty in the pilot house (Apostles, p. 33). About a minute later another single whistle was heard and reported as coming from the same direction (Apostles, pp. 19, 33). After the usual interval of about a minute another whistle was heard ahead, this time the fog whistle of a tugboat with a tow (one long and two short blasts), followed by a danger signal from the tugboat, which was answered by a like signal from the "Rosalie" (Apostles, pp. 26, 33). At this time lights were seen a short distance ahead, and the bow of the "Rosalie" came in

collision with the bow of the barge lashed to the port side of the tug "Tillicum." According to the clock in the pilot house of the "Rosalie," this collision occurred at 5:10 A. M., five minutes after passing West Point light (Apostles, p. 33); and according to the testimony of Captain Hanson, the mate of the "Rosalie," the place of collision was about three-quarters of a mile southeast of West Point light (Apostles, p. 32).

The tug "Tillicum" left the Standard Oil Dock at the port of Seattle at 4:15 A. M. of said day, with Barge No. 8 made fast on her port side, the barge being loaded with two oil tank cars (Apostles, pp. 82, 92). This barge was 28 feet wide and 100 feet long, and was so loaded as to be higher in front. The cars were lashed upon tracks on the barge, one in front of the other. The tugboat proceeded on her usual course towards Marysville. A thick fog prevailing, she gave her fog signals at regular intervals. As she proceeded along under Magnolia Bluff and near the vicinity of Four-Mile Rock, she slowed down to about three miles an hour, for the purpose of locating her position by the echoes from the bluff, so that she might know when to change her course to pass West Point light (Apostles, pp. 83, 94). Pilot Anderson was on duty, navigating the tugboat, and Captain Charlesworth was in the pilot house acting as lookout. After proceeding at this speed for about five minutes, having heard no whistle from any other vessel, she got an echo of her own whistle from some object ahead of her. She

immediately stopped her engine and drifted until the next whistle was given, when the echo from ahead was repeated and at about the same time the lights of the "Rosalie" appeared a short distance ahead. She thereupon reversed full speed astern, and immediately gave the danger signal, as provided by Rule 3, Article 18, of the Pilot Rules, followed by three whistles to give information that she was going full speed astern, and her danger signal was answered by a danger signal from the "Rosalie" (Apostles, pp. 84-86). A collision followed, and damages were suffered both by the "Rosalie" and the barge. Each is seeking in this proceeding to recover from the other the damages suffered by it.

According to the clock of the "Tillicum" the collision occurred at 5:15 A. M. (Apostles, p. 91), and its officers estimate the place of collision at about a mile to a mile and a quarter southeast of West Point light (Apostles, pp. 107, 108).

It may be added that after each of the vessels had ascertained that no serious injury was done to the other, the "Rosalie" proceeded on her course to Seattle and the "Tillicum," having made fast the lashings of the barge which had been parted by the collision, proceeded on its course toward West Point. According to the testimony of the master and the mate of the "Tillicum," they shortly passed out of the fog bank, when they could see West Point light distinctly, distant about a mile or a mile and a quarter (Apostles, pp. 107, 108).

From the undisputed facts in this case it becomes

evident that a dense fog was lying over the port of Seattle and extending northward over the water along Magnolia Bluff, and that farther to the westward and northward a very slight fog or haze only prevailed. It was for this reason doubtless that the "Rosalie" heard on each of the occasions mentioned by its officers but one of the three whistles (one long and two short) given with each signal of the "Tillicum." In other words, the two short whistles following the long blast were evidently deflected sufficiently so that the sound waves did not reach the "Rosalie." In like manner the whistles of the "Rosalie," given before she entered the denser fog bank which at all times enveloped the "Tillicum," were manifestly deflected and were not heard on the "Tillicum" until the alarm signal given by the "Rosalie" just before the collision. This is not an unusual phenomenon, as is well known to all navigators and fully recognized in numerous opinions of admiralty courts.

*The Lepanto*, 21 Fed. 656.

*Quinette v. Bisso*, 136 Fed. 832.

*Moore on Facts*, Vol. 1, Sec. 273 *et seq.* and cases cited.

In the trial court it was contended by claimant (appellant here) that the "Rosalie" was at fault (1) in navigating at an excessive rate of speed; (2) in navigating without due caution after hearing a steam vessel forward of her beam whose course and position were not ascertained, (3) in failing to give

proper signals when it became apparent that the course and intention of the approaching vessel was not understood.

On behalf of the libelant (appellee here) it was contended that the tug "Tillicum" was at fault (1) because she did not have a proper lookout and (2) because she did not stop and reverse in time.

The trial court held that the "Rosalie" was at fault for not navigating with due caution after hearing a steam vessel forward of her beam, but did not pass upon the question of her alleged fault in navigating at an excessive rate of speed. In respect to the "Tillicum" the trial court held that as soon as its officers heard the echo from the object ahead they stopped its engines and navigated with caution; but held that the "Tillicum" did not have a proper lookout.

The damages of the "Rosalie" were found by the Court to be \$5116.12, and those of the "Tillicum" and scow to be \$597.30, a total of \$5713.42; and the Court held that the damages should be equally divided. A judgment was accordingly entered in favor of the libelant for \$2856.71. From this judgment the appellant prosecutes this appeal and makes the following



## ASSIGNMENTS OF ERROR.

First.—The court erred in holding that the towboat “Tillicum” was at fault for not having an additional lookout stationed at her bow.

Second.—The court erred in holding that the lookout maintained by the towboat “Tillicum” in her pilot house was not a proper and sufficient lookout.

Third.—The court erred in holding that the towboat “Tillicum” and her barge had not overcome their forward motion at and prior to the collision of the “Rosalie” therewith.

Fourth.—The court erred in holding that the towboat “Tillicum” and her barge were not making sternway at the time of the collision.

Fifth.—The court erred in holding that the failure of the “Tillicum” to maintain a lookout at her bow was a fault contributing to the collision.

Sixth.—The court erred in holding that the improper navigation of the steamship “Rosalie” was not the sole cause of said collision.

Seventh.—The court erred in refusing to hold that the burden of proof was upon the “Rosalie” to show that her fault was not the sole cause of said collision.

Eighth.—The court erred in finding and decreeing that damages should be divided.

Ninth.—The court erred in finding the damages sustained by the “Rosalie” were grossly in excess of her actual damage.

Tenth.—The court erred in refusing to award to the cross-libellant its full damages and costs.

## ARGUMENT.

## I.

**The Faults of the "Rosalie."**

*(Assignments Sixth and Seventh.)*

Since the trial court held the "Rosalie" at fault and no cross-appeal has been taken by libellant, it might at first blush appear to be unnecessary to here review the faults of the "Rosalie." The trial court, however, appears to have rested his finding and judgment solely upon the ground that "the 'Rosalie' did not navigate with due caution after hearing a steam vessel forward of her beam." She, in fact, committed other and even greater faults. If these faults constituted express violations of the statute and were of so grave a character as in themselves to sufficiently account for the collision, the burden is, we think, on her to show that they did not constitute the sole cause.

The rule is, we think, correctly expressed in a recent decision of the District Court for the District of Oregon in the case of *The Thielbek*, 218 Fed. 251, 254:

"Her fault was sufficient to account for the accident, and she is not permitted to escape liability by raising a doubt regarding the movements of the Ocklahama. \* \* \* Any doubts arising from her [the Ocklahama's] movements, or the contribution of her faults, if any, to the collision, should be resolved in her favor."

See also:

*The North Point*, 205 Fed. 958.

*The Providence*, 98 Fed. 134.

*The H. F. Dimock*, 77 Fed. 230.

*The Pennsylvania*, 19 Wall. 125, 136.

*The Britannia*, 153 U. S. 130, 143.

*The Beaver*, 197 Fed. 869.

The excessive speed of the "Rosalie" not only violated Article 16 of the International Rules, which provides that "every vessel shall, in a fog, mist, falling snow, or heavy rainstorm, go at a moderate speed, having careful regard to the existing circumstances and conditions"; but was in itself quite sufficient to account for the collision, notwithstanding the fault attributed by the court to the "Tillicum" in not having a lookout stationed at her bow.

A brief consideration of the testimony offered on behalf of the "Rosalie" itself will clearly demonstrate that she was proceeding into a fog of increasing density at an excessive rate of speed. It is admitted that the usual rate of speed of the "Rosalie" was nine and one-half knots per hour (Apostles, pp. 23, 41, 42). The mate, who was on duty in the pilot-house, testified that the collision occurred about three-quarters of a mile on this side (towards Seattle) of West Point (Apostles, p. 32). He further testified as follows:

"Q. Did you hear any whistles ahead of you, captain, after passing West Point light?

A. Well, not when I passed; but after three minutes I heard a whistle ahead." (Apostles, p. 33.)

This would be 5:08 by the "Rosalie's" time. He then claims to have stopped the engines and drifted about a minute, when he again signaled full speed

ahead (Apostles, p. 33). This would be by the "Rosalie's" time 5:09. He further testified that at that time he heard another whistle ahead, and thereupon reversed his engines. He next heard a tow whistle ahead, followed by a danger signal, and adds: "I saw a red light just about the time they blowed their danger signal, and I blowed at the same time I seen that."

"Q. About what time did you come in collision?

A. 5:10.

Q. How long, captain, to your best judgment, do you think you had been backing your boat before you came in contact with that scow?

A. Backing about a minute." (Apostles, pp. 33, 34.)

Thus from 5:05 to 5:09 he was proceeding on his course into a fog of increasing density, and during approximately a minute of that time he claims to have stopped his engines. According to his testimony, he had traveled up to the time of the collision at 5:10 three-quarters of a mile. If the testimony of the officers and crew of the "Tillicum" as to the place of the collision is to be accepted, this distance was not less than a mile (Apostles, pp. 107, 108). Assuming, however, that the distance was only three-quarters of a mile, that distance was covered by the "Rosalie" in five minutes, during which period, as claimed by her officers and crew, she had stopped her engines approximately one minute and had been reversing for approximately another minute. To cover this distance in five minutes the "Rosalie" must have traveled at an average rate of speed of

nine knots an hour. It becomes evident, therefore, that she was proceeding into this fog at a grossly excessive and negligent rate of speed and was guilty of violating an express provision of the statute.

*The Louisiana*, 2 Benedict, 371.

*The Luray*, 24 Fed. 751 (5½ miles an hour).

*The Umbria*, 166 U. S. 404.

*The Martello*, 153 U. S. 70 (5 or 6 miles an hour).

*The Providence*, 98 Fed. 132 (5 miles an hour).

*The Niagara*, 77 Fed. 329 (8 or 10 knots—fog as a medium).

The “*Rosalie*” also violated the second paragraph of Article 16 of the International Rules, which provides that

“A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.”

According to her own testimony she heard a single whistle slightly on her port bow in the fog ahead of her about three minutes after passing West Point light. She claims to have stopped her engines for nearly a minute, when, hearing no further whistle ahead, she proceeded on her course (*Apostles*, pp. 19, 33). She was, therefore, guilty of the fault attributed to her by the trial court.



The "Rosalie" also violated Rule 3 of Article 18 of the International Rules, which provides that

"If, when steam-vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle."

According to her testimony, on hearing the second single whistle on her port bow, the mate of the "Rosalie" stopped her engines, and then reversed them, without giving the signal prescribed by this rule (Apostles, pp. 43, 44). Whatever the density of the fog immediately about him, it must have been evident that a dense bank of fog lay ahead. In that fog bank he knew there was a vessel in motion, whose position, course and intention he then had no means whatever of discovering. It was, therefore, his plain duty to give several short and rapid blasts of his whistle (Rule 3, Art. 18, *supra*) followed by three short blasts, which would have advised the boat ahead of him that he had reversed his engines (Pilot Rules for Harbors and Inland Waters, p. 18). Had he done so, his whistles would doubtless have been heard by the "Tillicum" as he advanced into the fog where its density was practically the same as that enveloping the latter vessel.

These faults of the "Rosalie" being in themselves sufficient to account for the collision, the trial court erred in not placing upon her the sole responsibility therefor.

## II.

**The Court Erred in Holding that the "Tillicum" Had  
not Overcome Her Forward Motion at the  
Time of the Collision.**

*(Assignments Third and Fourth.)*

While that fact was not predicated as a fault to the "Tillicum," because she did in fact observe all the rules above cited, yet we think its consideration is material in determining whether the faults of the "Rosalie" sufficiently account for the collision.

According to the testimony, for about five minutes prior to the collision the "Tillicum" had been slowed down to a speed of three knots an hour (Apostles, pp. 94, 104). Her officers did not hear the fog whistles of the "Rosalie," evidently because these whistles were given before the "Rosalie" entered the denser fog bank surrounding the "Tillicum," lying along the shore of Magnolia Bluff, and were deflected by this fog bank. Their first knowledge that any object was ahead of them in the water was an echo from their own fog whistle (Apostles, pp. 84, 95). Pilot Anderson says: "We got the echo pretty near dead ahead, approximately dead ahead, a faint echo." This does not bring their situation within either Article 16 or 18 of the International Rules above quoted. If they had heard a fog whistle they would have known that a vessel in motion was ahead of them. The echo of their own whistle disclosed that some object was ahead, which they naturally assumed to be a vessel; but whether it was at anchor, adrift, or under canvas, or was a steam vessel

being navigated under the command of competent officers, they had no means of determining. The only duty resting upon them was to exercise reasonable care in the light of the circumstances. They were then proceeding at a speed little more than sufficient to give them steerageway, and they did the manifestly proper thing, namely, stopped the engines of the "Tillicum." This, with a square-bowed barge lashed to her side, would cause her momentum through the water to rapidly diminish. If the object ahead were not in motion or were a sailing vessel, it was the only way in which they could navigate with due care to ascertain the position and whereabouts of that object and take the necessary precautions to avoid it. If, on the other hand, the object ahead of them were a steam vessel being navigated by competent officers, they had the right to assume that it would be operated at a similar rate of speed and with like precautions. If such had been the fact, no collision would have occurred.

After the engines were stopped another fog whistle (one long and two short blasts) was given at the usual interval, when the echo was again heard directly ahead. They thereupon signaled the engineer to reverse full speed astern. At the same time the master, seeing the glimmer of a light ahead, gave the danger signal, followed by three blasts, signifying that his engine was reversed (Apostles, pp. 85, 86).

When the lights of the "Rosalie" were first seen they were estimated by the master of the "Tillicum" to be distant about 200 feet (Apostles, p. 91).

When these signals were given the engines of the "Tillicum" had been stopped for approximately a minute. Proceeding as she had been for some time at a speed of only three knots an hour, and towing by her side a square-bowed barge 28 feet in width, her momentum must have been largely overcome at the time when her engines were reversed. On this subject the engineer testifies: "She would not be making over a mile an hour; not that I don't suppose" (Apostles, p. 105); and the fireman, Biggs, testifies that at the time when her engines were reversed "she was going pretty slow; she was very near stopped" (Apostles, p. 180). Her engines were reversed for fifteen or twenty seconds before the collision occurred (Apostles, p. 106). The engineer says: "She turned up three or four hundred revolutions before the collision. I think that would give her sternway, headway astern" (Apostles, p. 105). Both Captain Charlesworth and Pilot Anderson testified that before the collision they saw the water churning away from the bow of the barge and the tug (Apostles, pp. 86, 98, 99).

By these facts we think it clearly appears that the "Tillicum" and her barge were making sternway and that the collision was caused solely by the momentum of the "Rosalie." This conclusion is confirmed by the application of the simplest laws of physics to the facts in this case. The "Rosalie" was a vessel of 318 gross tons. The collision was between her and a flat-bottomed barge 28 feet wide and 100 feet long, carrying two oil tank cars. The



gross tonnage of the barge and her cars is not given, but it could not well have exceeded twenty or twenty-five tons. The momentum of a moving body is the product of her weight and speed. At a given speed the momentum of the "Rosalie" would therefore be twelve times as great as the momentum of the barge. According to the testimony of the "Rosalie" the force of the blow was sufficient to split her stem and apron from the guards down to the forefoot. These were heavy oak or fir timbers covered in front by a stem iron. The force of the blow to the barge is equally significant. Her oil tanks were located on parallel rails so situated as to place the weight in the rear part of the barge, the front end being about three feet higher than the rear (Apostles, p. 101). These cars were lashed to the barge by four heavy galvanized iron chains, on each side, three-quarters of an inch to an inch in thickness (Apostles, pp. 88, 93). The barge was lashed to the "Tillicum" by two spring lines. The blow of the collision was sufficient to part the spring line ahead, thus letting the barge swing away from the bow of the "Tillicum" (Apostles, pp. 99, 100), and to drive the barge back with such force as to break these heavy galvanized iron chains and forge the cars ahead up the inclined rails so that the forward truck of the front car was propelled over the front end of the barge and dropped into the water. The force of this collision was so great that it needs but a moment's calculation to show it must have been caused by the momentum of the "Rosalie."



## III.

**Sufficiency of Lookout of "Tillicum."**

*(Assignments First and Second.)*

Capt. Charlesworth, master of the "Tillicum," acted as lookout and was stationed in the pilot house, which was about sixteen feet above the water and twelve feet back of her bow. On account of the fog he was unwilling to intrust this duty to another (Apostles, p. 170). Since Capt. Anderson, a licensed pilot, was on duty in the pilot house navigating the vessel, until the collision became imminent, the trial court did not question the competency of the lookout.

The fault was held to consist in the fact that the lookout of the "Tillicum" was not properly stationed, and the reason is thus assigned in the opinion of the court:

"The court cannot say that in a dense fog such as this was, that the lookout could have a better point of observation from the pilot house than from the bow of the boat. I think that in the towing of this scow, the lookout should have been stationed as far forward on the sailing craft as possible. \* \* \* The safety of life and property requires that a tug in towing a scow in the manner shown with the bow of the scow from twelve to thirty feet forward of the bow of the tug, in a dense fog, must have a lookout stationed farther forward than in the pilot house."

The duty of a vessel to carry a proper lookout arises from the obligation to exercise due care. Neither the duty nor the mode of exercising it is prescribed by statute law. It has in admiralty long

been the established rule of due care that vessels navigating in a fog or in the nighttime where there is danger of a collision shall have a competent lookout stationed in a suitable place to see and hear approaching vessels and to report the fact to the navigating officer. Whether the lookout is sufficient or is properly stationed is a question of fact in each particular case.

*The Pocomoke*, 150 Fed. 197.

The sole question here under consideration, therefore, is whether under the facts of this case the stationing of the lookout in the pilot house was the exercise of due care.

Rule 38 of the General Rules and Regulations prescribed by the Board of Supervising Inspectors, which under an Act of Congress have the force of law, provides:

“All passengers and ferry steamers shall, in addition to the regular pilot on watch, have one of the crew also on watch *in or near the pilot house; and this rule applies to all steamers navigating in the nighttime.*” (R. S. § 4405.)

The rule plainly recognizes that the pilot house is a suitable place for a lookout. We do not contend that it will necessarily be sufficient to have a lookout so stationed. What constitutes due care must depend upon the circumstances of each particular case. The size of the vessel or the circumstances of its navigation may require that a lookout be stationed at the bow, or the stern, or, indeed, that one be stationed at each of these places. In

view of the size of the "Tillicum" and the nature of its bow, it is evident that her pilot house afforded the best opportunity both to see and to hear. This is confirmed by the testimony of the master of the "Tillicum" (Apostles, p. 170), of the mate (Apostles, pp. 174, 175), of R. A. Turner, local inspector (Apostles, p. 176), and also of Captains Smith and Ackles, licensed masters and pilots (Apostles, pp. 178, 179). No testimony was offered to dispute this evidence.

Moreover, the testimony in this case discloses that Capt. Charlesworth saw the lights of the "Rosalie" before either the lights on the barge or the "Tillicum" were visible to the lookout on the bow of the "Rosalie" or the officers in her pilot house (Testimony of Capt. Charlesworth, Apostles, p. 85; Pilot Anderson, p. 96; Lookout Bougojard, p. 19; Mate Hanson, p. 33).

The only question remaining, then, is: Could the lookout have heard better on the bow than in the pilot house? The testimony shows that there would have been more interference from noise in the former place. The trial court, in dealing with these questions, says:

"The further contention that a person could see and hear better from the pilot house because of its elevated position than from the bow of the vessel, I think, is answered by the testimony in this case, which shows that the fog was general. If the testimony should disclose that the fog bank lay near the water and that the pilot house extended above the fog, the contention might have some force."

This conclusion disregards both the facts and the well-known aberrations of sound in fog. The latter subject has afforded a wide field of scientific inquiry. (Moore on Facts, § 273.)

There is in the facts of this case no room for an inference that if the lookout had been stationed on the bow of the "Tillicum" he could either have heard or seen the "Rosalie" better or appreciably sooner; or if he had been so stationed that the "Tillicum" could have been so navigated as to avoid the collision. Her lookout should, upon the facts in this case, be held sufficient to comply with her obligation to exercise due care.

*The Ping-On v. Blethen*, 11 Fed. 607.

*McFarland et al. v. Selby Smelting & Lead Co.*, 17 Fed. 253.

*The Pocomoke*, 150 Fed. 193.

*The Caro*, 23 Fed. 735.

*The Ship Shakespeare*, 4 Benedict, 128.

*The Steamer Hansa*, 5 Benedict, 501.

#### IV.

##### **Division of Damages.**

*(Assignments Fifth and Sixth.)*

It will be observed that the trial court did not expressly find that the "Tillicum" was guilty of a fault which contributed to the collision. What it did find was that its lookout was insufficient because not stationed farther forward than the pilot house. From this fact the court concluded that "the 'Tillicum,' not having shown that such fact did not

contribute to the disaster, must be held to have contributed to the collision," and hence that the damages should be equally divided. In thus holding the court proceeded upon an erroneous view of the law.

Even if it be conceded, in the face of the positive and undisputed evidence of expert witnesses, that a more suitable and appropriate place for the lookout under the circumstances of this case was on the bow of the "Tillicum" or upon the barge, it does not follow that the fact that the lookout was stationed in the pilot house instead was such a want of due care as directly contributed to the collision. The purpose of the lookout is to see and hear in fog or darkness and to report the presence of dangers to be avoided. In such a fog as then prevailed the things to be seen are the lights of an approaching vessel, and the things to be heard, her whistles. Each in the case of the "Rosalie" was located at an elevation greater than the pilot house of the tug. The distance of either to any suitable place for a lookout on the bow of the tug or the barge in a direct line would not be appreciably less than the distance to the eye or ear of the master standing in the pilot house. Without reference to the positive evidence on the subject given on behalf of the "Tillicum," it is difficult to conceive that either the lights or the whistles of the "Rosalie" could have been seen or heard and reported by a lookout stationed as the trial court suggested, so as to have enabled the tug to act more promptly or to do more than she did to avoid the collision.



It cannot be said, therefore, that the fault ascribed to her by the trial court was a contributing fault.

*The Elk*, 102 Fed. 697, 698.

*The Bluejacket*, 144 U. S. 371, 389.

In the former case it is said:

“The law is well settled that the absence of a special or proper lookout does not subject a vessel to liability for damages for collision, unless such absence has in fact contributed to the collision.”

It is established by the undisputed facts in the case that the speed of the “*Rosalie*” was so grossly excessive that the collision under the circumstances was inevitable after the tug discovered her proximity. If the “*Rosalie*” stopped and backed, as claimed by her witnesses, her speed in entering the fog prior to such manoeuvres must have been considerably in excess of nine knots an hour. Capt. Barlow, the master of the “*Rosalie*,” testified that if he stopped the engines when his vessel had a speed of seven or eight knots an hour “in that kind of weather she would carry her headway about seven minutes” (Apostles, p. 69). He also testified, “in calm weather we figure on making a landing, \* \* \* in four minutes from the time I slow down until I stop and take the slip” (Apostles, p. 69). He was then asked:

“Q. If you were going full speed ahead and you were to stop and give a signal full speed astern, how long would it take you before you were making stern-way?

A. A little less than two minutes.” (Apostles, pp. 69, 70.)

The most that is claimed by the witnesses of the "Rosalie" is that she stopped about a minute and reversed about a minute. On this subject Capt. Hanson, navigating officer of the "Rosalie," testified, on direct examination:

"Q. How long, captain, to your best judgment, do you think you had been backing your boat before you came in contact with that scow?

A. Backing about a minute." (Apostles, pp. 33, 34.)

Bougojard, the lookout, testified that after hearing the second whistle of the "Tillicum" (when Mate Hanson claims to have reversed his engines) it was about a half minute or less until the next whistles were heard from the "Tillicum" (Apostles, p. 27). And this is confirmed by Gates, the man at the wheel (Apostles, p. 62). From that time it appears to have been only fifteen or twenty seconds until the collision occurred.

The lookout naively said in his direct examination: "We hit the barge a glancing blow" (Apostles, p. 20). Mr. Kinsey, the engineer, asked if he knew when they came into collision, said: "Yes, I felt them stop" (Apostles, p. 48); and Gates, who was at the wheel, testified: "I could not see exactly from where I was *where she struck the tow*" (Apostles, p. 63).

Hence it is apparent that at the excessive speed at which the "Rosalie" entered this fog, with the knowledge that a steam vessel was approaching slightly on her port bow, the collision was inevitable.

The "Rosalie" was guilty of gross negligence.

Her fault was sufficient to account for the disaster; and unless she has made it clearly appear that the "Tillicum" was guilty of a fault, but for which the collision would not have happened, she must be held solely responsible therefor.

*The Nacoochee*, 137 U. S. 330, 338, 339.

*The City of New York*, 147 U. S. 72, 84, 85.

*The Ludvig Holberg*, 157 U. S. 60, 71.

*The Umbria*, 166 U. S. 404, 409.

*The Pallanza*, 189 Fed. 43.

*The Thielbek*, 218 Fed. 251, 254.

In the case of *The Nacoochee* (*supra*) the steamer entered a fog at a speed of six or seven knots an hour. She later discovered a schooner approaching at a distance of about 500 feet, and she was unable to overcome her momentum in that distance by reversing her engines. The Court said:

"She was bound, therefore, to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog." (Citing authorities.)

It was, however, contended that the schooner was at fault in sailing too shorthanded in a fog and in having an insufficient lookout; but the Court held that "the steamer was bound to keep out of the way of the schooner, and the burden rests upon her to show a sufficient reason for not doing so. She must be held wholly responsible, unless she shows a fault on the part of the schooner which contrib-

uted to the collision, or that it was due to unavoidable accident." (p. 338.)

In *The City of New York* (*supra*) a collision occurred in a fog between a steamer and a schooner. The steamer was running at her usual speed. Mr. Justice Brown in that case said:

"Upon the findings of the Circuit Court there can be no question of the gross negligence of the steamship. She was not only not running at the moderate speed required by rule 21, but she failed to take the proper precautions when the proximity of the sailing vessel became known to her."

Referring to the contention that the schooner was likewise at fault, the Court said (p. 85):

"In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

The case of *The Umbria* (*supra*) in certain respects resembles the case at bar. The *Umbria* was proceeding in a fog at a grossly excessive speed. It was contended that the *Iberia* was at fault in changing her course. Mr. Justice Brown, in the course of his opinion, says:

“Indeed, so gross was the fault of the Umbria in this connection, that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 85, and *The Ludvig Holberg*, 157 U. S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor.”

It seems clear, therefore, that under the facts of this case and the applicable rules of law, as announced by the Supreme Court of the United States, the trial court erred in entering judgment against appellant for one-half the total damages.

## V.

### **The Damages of the “Rosalie.”**

*(Assignments Ninth and Tenth.)*

Even if this Court should uphold the conclusion of the trial court that both vessels “must be held to have contributed to the collision,” we respectfully contend that the damages found to have been suffered by the “Rosalie” are grossly excessive.

Broadly speaking, these damages as asserted are are of three classes: (1) The alleged cost of her repairs; (2) the wages claimed to have been paid to the crew retained on her during the period of repairs; and (3) demurrage.

The first and second appear to have been allowed in full by the trial court in the amounts of the bills rendered, which are, respectively, \$3385.32 and \$130.80; the demurrage representing the balance, to-wit, the sum of \$1600.00.



(1) The libelant in the first instance introduced evidence that a survey of the "Rosalie" was made after the collision and that the libelant paid the bill of Heffernan Dry Dock Company for making the repairs called for thereby. The bill was introduced in evidence as libelant's exhibit "B," which is an itemized bill aggregating \$3385.32. The bill appears upon its face to be excessive in certain particulars. For example, it appears from the bill that the vessel was in dock for repairs six days. The number of hours charged in the bill for labor on this work would have required, at eight hours per day for each man, that more than sixty men should be engaged daily during this time in making the repairs. No evidence was offered by libelant, in the first instance, as to the necessity or the value of the labor and materials which compose the items of the bill.

The appellant introduced in evidence the survey of libelant's surveyors, describing the injuries and containing the recommendations for repairs. Three experienced shipbuilders were then examined (M. H. Sandstrom, *Apostles*, pp. 119-130; A. M. McKay, pp. 131-137; John L. Hubbard, manager of Hall Brothers' shipyard, pp. 137-146). These witnesses each examined the itemized bill in the light of the requirements of the survey and pointed out wherein the items were unnecessary for the repair of the injuries caused by the collision or were excessive. Sandstrom and McKay testified that the work could be reasonably done for \$850, including the docking, and that they would have been willing

to take the contract for that sum. Hubbard testified that a maximum sum would have been \$1050, for which he would have gladly taken the contract, and that the probable expense would not have exceeded \$900 to \$950. Chas. Redmond (Apostles, pp. 146, 147) and Charles Martin (Apostles, pp. 148, 149) were also examined on behalf of appellant and testified that they had performed work in making these repairs. From the testimony of all these witnesses the conclusion must be reached that the bill of libellant for the repairs was grossly excessive and that if the material and labor were supplied to the "Rosalie" they must have covered repairs and betterments not occasioned by the collision. Joshua Green, president of libellant company, admitted that other repairs were made at the time (Apostles, p. 79).

(2) The item for \$130.80 for the ship's crew should not be charged as an expense incident to the collision. Frank Walker, one of libellant's surveyors, testified that the "Rosalie" had lost her propeller on a previous occasion and a temporary one had been installed, awaiting her regular docking, and that a new propeller was installed on this occasion *by the crew of the "Rosalie"* (Apostles, p. 165). Mr. Green testified, "in looking that up I found there were some of these repairs that had nothing to do with this collision at all. Probably repairs to the engine or some part of the stern, that were not connected with this" (Apostles, p. 79). If a portion of the crew was retained on the "Rosalie,"

as here appears, for the purpose of doing other work or making necessary repairs on the vessel, their wages should not be included in the present claim. Since no attempt has been made to show what part, if any of this bill, was necessarily incurred by the collision, no portion of it should be allowed.

(3) Demurrage. It clearly appears from the testimony that this occasion was made use of by libelant for installing a propeller, making certain necessary repairs, and giving the "Rosalie" her annual overhauling and repainting. Since no attempt was made by libelant to show what additional time, if any, the "Rosalie" was withheld from service, in consequence of the collision, no proper foundation is laid for the demurrage claimed.

The claims of libelant are so unreasonable and excessive that they suggest a practice, not altogether uncommon in such cases, of attempting to repair and renew an old ship at the cost of another than the owner.

— — — — —

In conclusion, the disparity between the respective claims for damages is so great, and the fault of the "Rosalie" so clearly established, that a court should hesitate to apply a rule which would divide the damages equally between the two vessels.

*Jacobsen v. Dalles P. & A. Nav. Co.*, 106 Fed. 428.

To paraphrase the language of the Court in the case of *The North Point*, 205 Fed. 958:

“The action of the (Rosalie) in thus navigating in a fog in plain violation of the rules, is sufficient to and does account for the happening of the occurrence; and hence she cannot escape responsibility for her negligent acts by attempting to place doubt upon the conduct of those navigating the (Tillicum). The burden would be clearly upon the (Rosalie) to establish such negligence, and that it brought about the disaster, in order to hold the (Tillicum) liable in whole or in part for the collision, which burden she has plainly failed to meet.”

In the case of *The Transfer* No. 8, 96 Fed. 253, it is said:

“The fault of the Waterman is so glaring, and its consequences precipitated a situation involving such difficulties, that we are not inclined to be severely critical of the maneuvers by which the *Transfer* undertook to escape from it.”

See also:

*The Chicago*, 125 Fed. 716.

In the language of Judge Adams in the case of *The Ashbourne*, 181 Fed. 815:

“There has been a strong disposition manifested on the part of the courts recently to let the blame rest where it principally belongs.”

Under the facts and the law of this case, we respectfully submit that the claim for damages made by the libelant should be rejected, and that the owner of the “Tillicum” should be allowed to recover the damages proven herein.

Respectfully submitted,

HUGHES, McMICKEN, DOVELL & RAMSEY,  
*Proctors for Appellant.*

No. 2616

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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STIMSON MILL COMPANY, a corporation,  
Claimant of the Tow Boat "Tillicum," her  
Engines, Boilers, Tackle, Apparel and Furni-  
ture, Appellant,

VS.

THE INLAND NAVIGATION COMPANY, a  
corporation, Claimant of the Steamer "Rosa-  
lie," her Tackle, Apparel and Furniture,  
Appellee.

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UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

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**BRIEF AND ARGUMENT OF APPELLEE**

---

IRA BRONSON,  
J. S. ROBINSON,  
H. B. JONES,

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Seattle, Washington.

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**CLERK.**





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**BRIEF AND ARGUMENT OF APPELLEE**

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INTRODUCTORY.

The learned proctors for the appellant have devoted the major portion of their brief to a vehement but labored attack upon the conduct of

the "Rosalie." Much of this argument is so strained and unsound that it invites a reply. For example, a calculation is made upon page sixteen which it is alleged shows that the collision was caused by the momentum of the "Rosalie." It is absurd, of course, to attempt to calculate the momentum of a moving body without knowing its speed, and no one can say with any certainty whether or not the Rosalie had any movement at all. But this is by no means the most ridiculous feature of the calculation. It begins with the premise that the weight of the barge and her cars could not have exceeded twenty or twenty-five tons. (Brief 16). The barge was admittedly one hundred feet by twenty-eight and the cars were loaded with oil. (Par. I and II, Cross-Libel Ap. 9). Either car of course weighed more than twenty-five tons, a car float 100x28, must be fairly heavy, and then too it was lashed to a tug of 116 tons, and the whole mass moved as a unit.

But we cannot be diverted from the real issues on this appeal to answer this argument on the question of the "Rosalie's" fault, unsound as that argument is. As is invariably the case in head-on collisions, the crew of each boat declares their own vessel was at a standstill or had sternway and that the other vessel was coming ahead. We believe that the evidence for the "Rosalie" preponderated on this point. The Court, however, felt that the conflict was such that he was required, as judges often are in such cases, to harmonize the evidence,



and he did so by finding that both vessels were moving vessels. Though not agreeing with the trial court's decision as regards the "Rosalie" we recognize that it is supported by some evidence, and believing therefore that it would not be disturbed by the appellate court, we have not cross-appealed. But we do challenge the statement that the Rosalie was guilty of fault. The position of appellant that she was guilty of such grievous faults as to excuse those of its own vessel is so unwarranted that we pass it by without argument. If by the vehement claims of proctor this court is induced to believe that this issue is pertinent in this appeal, the record is before the court and speaks for itself.

The only questions before this court are whether the trial court rightly found the "Tillicum" chargeable with fault and whether it made a correct finding as to damages.

In discussing the first question we will not refer to any testimony other than that given by the appellant's own witness.

### THE TILlicum HAD NO LOOKOUT.

The collision took place in a thick fog in Seattle harbor. The "Tillicum" was proceeding through this fog with a scow one hundred feet long and twenty-eight feet wide lashed to her port side. The barge was laden with two ordinary oil tank cars. The bow of the scow projected thirty feet beyond

the bow of the "Tillicum." (Captain Charlesworth, Ap. 84 and 89). It was twelve feet from the bow of the tug to the pilot house. (Ap. 82, 89). The following testimony of Captain Charlesworth, Master of the "Tillicum" shows that his tug had no lookout.

“Q. Who was on the lookout with you?

A. I was the only one on lookout.

Q. Where were you?

A. In the pilot house.

Q. Who else was in the pilot house?

A. The mate.

Q. Was he on duty in the pilot house also?

A. Yes sir.” (Ap. 85).

The mate was handling the wheel (Ap. 93) and he and the captain were the only men on deck. (Ap. 88). We submit the following authorities.

“Two objections are made to the master as lookout, even admitting that he was on deck, and they are both well taken. Admission of the appellant is that the master was the officer of the deck, and that he had charge of navigating the vessel; and the proofs are satisfactory that if he was on deck at that time at all, he was in the wheel house with the man at the wheel. Steamers are required to have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must be actually employed in performance of the duty to which they are assigned. They must be persons of suitable experience properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty. Proper lookouts are competent persons other than the

master and helmsman, properly stationed for that purpose on the forward part of the vessel; and the pilot house in the night time, especially if it is very dark, and the view is obstructed, is not the proper place."

*The Ottawa*, 3 Wall 269; 18 L. ed. 165 at 167.

The above is a leading case on this point, and, as shown by Rose's notes and Supplement thereto, has been cited and followed dozens of times.

"The doctrine is well settled that the lookout required by the rules must not only be competent, but charged with no other duty while so serving and that the officer navigating the steamer cannot at the same time serve as lookout."

*The J. C. Ames*, 121 Fed. 918.

"There are indications too that the *Alma* was not keeping a proper lookout, she had no lookout other than the master. Although he was on the roof of this boat sitting by the bell, he did not observe the lights, on the *Echo* or the whistles blown by her, or, indeed, know that she and her tow were approaching, until the searchlight was turned upon them by the pilot of the *Alma*. It is the duty of every steamer navigating the thoroughfares of commerce to have a trustworthy lookout besides the helmsman \* \* \* When acting as an officer of the deck and having charge of the navigation, the master of a steamer is not a proper lookout. Proper lookouts are persons other than officers of the deck or the helmsman."

*The Echo*, 131 Fed. 630.

"The lookout should be charged with no other duty than that to which he is assigned, and in that duty he should be actually vigilant and

continuously employed without having his attention distracted by any other service."

*City of Phila. v. Gavingnan*, 62 Fed. at 619.

"It also appears from the proof that, after the light of the Myrtle had been seen on board the Lookout, her captain allowed his wheelsman to go below to get lunch, while the lookout was sent aft to take the wheel, and, as the full watch consisted of only the captain and two men, this left the captain to perform the double duty of officer of the deck and lookout, which, with another vessel approaching, and in close proximity, was in itself an act of negligence, as it left his vessel practically without a lookout. *The Ottawa*, 3 Wall 268; *The Hypodame*, 6 Wall 216. Had there been a vigilant and competent lookout on libellant's vessel, charged with no other duty, it is probable that the captain would have been kept constantly advised of the situation of the Myrtle as the vessels neared each other, and the collision averted. While embarrassed by the double duty he had assumed, the captain of the Lookout committed the fatal error of going to port when he should have gone to starboard."

*Larsen v. The Myrtle*, 44 Fed. 779 at 781.

See also the following cases in which the "*Ottawa*" is cited and followed:

*The Hypodame*, 6 Wall 224; 18 L. ed. 796;

*The Cambridge*, F. C. No. 2334;

*The Ancon*, F. C. No. 348;

*The Ant*, 10 Fed. 297;

*The Excelsior*, 12 Fed. 200;

*The Golden Grove*, 13 Fed. 691;

*McCabe v. Old Dominion S. S. Co.*, 31 Fed. 240;

*The Manhasset*, 34 Fed. 419;  
*The St. Nicholas*, 49 Fed. 679;  
*The Geo. W. Childs*, 67 Fed. 271;  
*The Livingstone*, 87 Fed. 777;  
*The Lansdowne*, 105 Fed. 441;  
*The Dauntless*, 129 Fed. 722;  
*The Tarpon*, 132 Fed. 278;  
*The Sitka*, 132 Fed. 864;  
*Bingham v. Luckenbach*, 140 Fed. 326.

Accordingly it appears from the evidence in the case, that within the meaning of the law, the "Tilliecum" had no lookout whatever. This is one of the most grievous infractions of the rules that can occur. This court, speaking by Morrow, C. J., in a case decided in 1901, said:

"The importance of the lookout and the high degree of vigilance required of the person occupying that position on a vessel, is clearly stated by the United States Supreme Court in *The Ariadne*, 13 Wall. 475, 478, 20 L. ed. 542, 543, as follows:

"The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel, with all the property and the lives of all on board. The same consequence may ensue to the vessel with which his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance.  
 \* \* \* It is the duty of all courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the per-



formance of the duty, and the effect of nonperformance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.'

"No deviation from this statement has been made by the Supreme Court in later cases (*The Oregon*, 158 U. S. 186, 193, 15 Supt. Ct. 804, 39 L. ed. 943), and it is therefore as binding to-day as when first made."

*Wilders S. S. Co. v. Low*, 112 Fed. at 172.

## LOOKOUT NOT PROPERLY STATIONED.

If against this overwhelming and unanimous array of authority it can still be maintained that Captain Charlesworth was a proper lookout he was not properly stationed. We here confine our citations entirely to tug cases. In a collision occurring in New York harbor the court said:

"The tug had no lookout and the question is whether she has sufficiently excused herself for the omission. In the proper exercise of his duties the lookout should have been located about fifteen feet ahead of the pilot house, where the pilot was stationed while navigating the vessel. The lookout would have had a somewhat better view ahead than the pilot and should have been exclusively engaged in watching."

*Erie R. Co. v. Oceanic Steam Nav. Co.*, 121 Fed. 440.

"But in view of all the evidence in the case, although the question must be admitted to be a close one, I am of the opinion that if the tug had had a proper lookout attending to his duty

he would have seen the launch. There was no lookout forward. The officers claimed that the wind was so heavy that morning that spray constantly dashed over the stem of the tug and that the pilot house was a better place for a lookout than the bow. I do not think so, a little spray may have occasionally broken over the bow, but I do not think it was heavy enough or constant enough to justify the tug in not having a lookout forward. There was a man in the pilot house with the captain."

*Cook v. Moran Towing & Transportation Co.*,  
188 Fed. 846.

"It appears that when the pilot of the Cheney did see the Palmer, he starboarded, and did in fact carry his vessel somewhat to port, but to what extent does not appear. But he was thirty feet aft of the bow occupied with his wheel. He was not a proper lookout, nor suitably located. \* \* \* If tugs will go about the harbor without lookouts, they may not expect that the Court will conjecture nicely what would have happened if a lookout had been in his place, doing his duty when a collision occurred."

*The Arthur M. Palmer*, 115 Fed. 417.

In fact under the circumstances a lookout on the bow of the "Tillicum" would scarcely have been sufficient. She was proceeding in a heavy fog, in frequented waters with a barge loaded with oil tanks projecting thirty feet ahead of her bow and more than forty feet ahead of her pilot house. (See cross-libel, par. II, and Captain Charlesworth's testimony, Ap. 82 and 89).

"I think the Skidmore is further to blame for not having lookouts on the bows of the two barges alongside, which ran ahead of her some

thirty feet, that is from 45 to 50 feet ahead of the pilot house.”

*The A. P. Skidmore*, 108 Fed. 972.

For similar cases see:

*The Lyndhurst*, 92 Fed. 681;

*The Elk*, 95 Fed. 846;

*The Transfer No. 25*, 211 Fed. 965.

## REPLY TO APPELLANT'S ARGUMENT ON LOOKOUT QUESTION.

### (a) Authorities cited.

Against the above array of authority the appellant cites six cases in its brief on page twenty. They deserve a brief examination.

The first case is *The Ping-on v. Blethen*, 11 Fed. 607. The tug Fokelin had the brig Condor made fast to her port side. On the poop deck of the Condor “were three experienced mariners”, her master, the master of the tug and a pilot keeping a vigilant lookout. The Court held that such lookout was sufficient for the tug and tow.

The second case is *McFarland et al v. Selby Smelting & Lead Company*, 17 Fed. 253. A small stern wheeler called the Pilot was backing out of a slip at 2:00 p. m. in “open daylight.” She got into a collision with the Bullion who charged her with

not having a lookout on the stern of her hurricane deck. The Court found that she had a lookout on her promenade deck; that he noticed the Bullion as soon as a lookout on the hurricane deck would have done, that he at once notified the captain of the Pilot, and that the complaint came with bad grace from the Bullion since "she herself had not a lookout stationed forward."

The third case is the *Pocomoke*, 150 Fed. 193. This case holds that a 61-foot government launch navigating in broad daylight, at nine in the morning, in good weather, with her master in the pilot house, well forward with all its windows open, and a deckhand forward of the pilot house whose especial duty was that of a lookout when the weather happened to be foggy, was not at fault for not having a proper lookout.

The fourth case is *The Caro*, 23 Fed. 735. In this case a collision happened between a tug and a schooner on a dark, but not a foggy night. Her lookout was in the pilot house with the helmsman. Says the Court:

"A lookout stationed on the deck between the pilot house and the stern would have been in danger of being swept off by the sea. Under the circumstances it was not negligence to station the lookout in the pilot house of the tug."

(This case of course impliedly recognizes that the proper place for a lookout is outside the pilot house).

The remaining two cases cited from Benedict, not being available to us, we are unable to say whether or not they are as hopelessly inapplicable to the case at bar as the first four.

(b) Custom, and Rule 38.

It will be seen upon examination of appellant's brief and more clearly by an examination of the record that it is contended that there is a custom here on Puget Sound which excuses a lookout on tugs. It appears from the testimony that there is such a custom (Ap. 178). This of course is irrelevant and immaterial. Vessel men cannot by custom change a rule provided to promote safety of life and property at sea.

"The statement that it is not customary for tugs to maintain a more vigilant lookout than this tug had is immaterial. The law determines their duty in this respect and they cannot avoid it without becoming responsible for the consequences."

*The George W. Childs*, 67 Fed. at 272.

And as Judge Hanford said in *The Marion*:

"There is no exception to the rule requiring a lookout in favor of craft capable of committing injuries on account of size."

*The Marion*, 56 Fed. 271.

This contention makes this case of great public importance because this custom appears to have had the approval of the local board of inspectors.

Captain R. A. Turner, the local inspector of



hulls and boilers, testified that the local board of steamboat inspectors regarded a master in the pilot house with the pilot as a sufficient lookout justifying this upon his construction of Rule 38 of the General Rules and Regulations prescribed by the Board of supervisory inspectors (Ap. 75-177).

This rule reads as follows:

“All passengers and ferry steamers shall, in addition to the regular pilot on watch, have one of the crew also on watch *in or near the pilot house; and this rule applies to all steamers navigating in the nighttime.*” (R. S. Sec. 4405).

We respectfully submit despite the testimony of Captain Turner that this rule does not authorize a steam vessel navigating in the night time from dispensing with a bow lookout any more than a rule requiring a signalman to be in the cab with a railroad engineer would authorize the omission of a rear brakeman. It simply adds to the general law an additional precaution, that is, it requires at least two men to be in the pilot house at night.

This rule but shows all the more clearly that Captain Charlesworth was not a proper lookout. He was the extra man required in the pilot house.

The rule, of course, applies to Inland waters, rivers and harbors. Says the Court in ruling upon a collision occurring in the Hudson River two miles south of Yonkers on a dark but clear night:

“So the steamer likewise had only the pilot and the captain in the pilot house and these have

been repeatedly held not to constitute a proper lookout."

*The Excelsior*, 12 Fed. at 200.

The rule begins "All passenger and ferry steamers." A ferry boat and a mud scow got into a collision in the inner harbor of Boston on a clear and starlit night. The ferry boat had a lookout in her pilot house. The ferry boat was held at fault by the Circuit Court of Appeals for not having a lookout on the main deck forward.

*Eastern Dredging Co. v. Winnisimmet Co.*,  
162 Fed. 860.

Plainly these courts were wrong if the construction of Rule 38 by the Local Inspector of Hulls and Boilers and by appellant's proctor is right. And so was Judge Butler who in the *George W. Childs*, 67 Fed. 271, held that a tug in collision on a clear night in the Delaware river was at fault, because her only lookout was stationed in the pilot house, and so was Judge Adams in his opinion in *Ere R. Co. v. Oceanic Steam Nav. Co.*, 121 Fed. 440.

But even if Rule 38 could bear the construction sought to be put upon it it would not affect the case at bar.

The closing words of the rule are, "and this rule applies to all steamers navigating in the night time," but it does not add, "and in fogs." The *Tillicum* was navigating on a *foggy night*; and the question whether she should have had a proper lookout under

such circumstances is the one in which we are directly interested. This court is seriously asked to hold that the navigation of the *Tillicum* up the water front of Seattle Harbor in a dense fog at night with no one on watch, save her master and pilot is specifically justified by Rule 38. Consider the far reaching consequences of such a decision, for the rule reads: "All passenger and ferry steamers." In the face of the accumulated decisions of a hundred years, in the face of the increasing tendency to more and more safeguard lives at sea, the Court is asked to render a decision, that says to a vessel owner; by positive statute you are permitted to send your vessel with a thousand sleeping passengers in her berths into Seattle Harbor, or any other American harbor, in a dense fog, at night, with no one on watch to guard them from death and disaster, save that vessel's master and pilot stationed in her pilot house.

On account of the fact that an erroneous view of the law concerning lookouts has prevailed in this locality, and in the minds of eminent counsel, and even in the minds of the Inspectors themselves, this question must have appeared to the trial judge to be of great public importance, as indeed it was. He not only shows it in the opinion rendered in this case, but in an opinion reported immediately after the opinion in this cause, in the *Wilbert F. Smith*, 210 Fed. at 981, he deals even more fully with the tug lookout question. We feel that he was so impressed with the public importance

of refuting this erroneous and dangerous view concerning lookouts that for that reason he neglected to notice certain other faults in the navigation of the "Tillicum" which were in themselves sufficient to have justified an award of damages against her in this case.

THE NAVIGATORS OF THE TILlicum VIOLATED THE SPIRIT OF RULE SIXTEEN AND WERE GROSSLY CARELESS IN THE PRESENCE OF KNOWN DANGER.

Here again we contend that the "Tillicum's fault is shown by the testimony of her master and mate, the only persons on her deck.

*Captain Charlesworth*

Q. What happened then Captain?

A. We really got an echo dead ahead.

\* \* \*

Q. What echo did you get ahead of you?

A. Some floating object.

Q. An echo of what?

A. I judged a steamer.

\* \* \*

Q. From some object ahead of you?

A. Yes.

Q. What did you take that to be?

A. A steamer. (Ap. 84)

\* \* \*

*Mate Anderson*

Q. Well what was the first indication you got that morning that there was an object ahead of you in the water?

A. Well we got an echo pretty near dead ahead or approximately dead ahead—a faint echo.

Q. What was that an echo of?

A. That was from our whistle. (Ap. 95).

\* \* \*

Q. What did you do as soon as you got the echo ahead of you?

A. Stopped her. (Ap. 84).

Q. Well after getting an echo from your fog whistle did you proceed until you gave another fog whistle? Did you give any other fog whistle?

A. Yes sir.

Q. In the mean time did you hear any fog whistle ahead of you?

A. No sir.

Q. About how long after the first fog whistle was it until you gave the second fog whistle, that is the first one from which you got the echo ahead?

A. Somewhere about a minute. (Ap. 85).

Q. What did you do, what was the first thing the captain did?

A. Slowed down sir.

Q. That is he gave a bell to the engineer?

A. Yes sir.

Q. To slow down?

A. Yes sir.

Q. Could you tell by the movement of the vessel that the engineer had slowed down?

A. Yes sir.

Q. Now tell what happened after that?

A. Well then after he slowed down we blowed the towing whistle again. (Ap. 95). \* \* \*

Q. Did you see or hear anything before you gave your next fog whistle?

A. No sir. (Ap. 96).

Although Captain Charlesworth testified that after being notified of the presence of a vessel ahead by the echo that he stopped, the mate testifies four times that they only slowed down. A chain is no stronger than its weakest link and this testimony on the part of the mate should be taken most strong-



ly against the "Tillicum." Rule 16 provides that:

"A steam vessel hearing apparently forward of her beam the fog signal of a vessel the position of which is not ascertained shall so far as the circumstances of the case admit, stop her engines and navigate with caution until the danger of collision is over."

30 Stat. L. 99.

Surely it will not be disputed that an echo of a whistle cannot be heard as far as a whistle especially when the echoing surface is a small dot on the water. This echo, as the captain and mate admit, informed them that a vessel was dead ahead. It of necessity also told them that it was not far away. The spirit of this rule if not the exact letter required them to stop their vessel instantly.

It will be noted by the Court that this case having been once submitted was reopened to permit the appellant to take further testimony in the lookout question. (Ap. 168). Appellant's proctor seized the opportunity to have the mate correct the above evidence but so persistent was the idea—for some reason—that the mate again testified that they slowed down. (Ap. 175).

But taking the more favorable evidence of the captain as true he was certainly guilty of grievous fault. Appellant's brief on page twelve makes this statement concerning Rosalie's master:

"In that fog bank he knew there was a vessel in motion, whose position, course and intention he then had no means whatever of discovering.

It was, therefore, his plain duty to give several short and rapid blasts of his whistle."

Captain Charlesworth may not have known that the vessel ahead of him was in motion but according to his own story he knew there was a steamer ahead of him in a fog so close that he got echoes from his own whistle, knew that she was inattentive to signals, had no possible means of knowing what she was, where she was or whither she was going and under such circumstances allowed his vessel to drift down upon her without blowing any alarm whistle, or even blowing an inquiry whistle of any kind for the space of a minute. (Ap. 84, 85). Surely no one can doubt that if this story is true the officers of the *Tillicum* were grossly negligent and must be so found under Art. 29.

"Nothing in these rules shall exonerate any vessel, or the master or crew thereof from the consequences of any neglect\* \* \* to keep a proper lookout or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Inland Nav. Rules, 30 St. L. 102, 2 F. S. Ann. 181.

It is fortunate for us that this account is found in the testimony of the mate and master themselves and does not depend upon that of other witnesses for it seems almost incredible that navigating officers would permit their vessel to drift into known danger. Inattention is common enough but their deliberate carelessness on this occasion is rarely matched.

THE BURDEN WAS ON THE APPELLANT  
TO SHOW THAT THE FAULTS OF THE  
"TILlicum" DID NOT CONTRIBUTE TO  
THE COLLISION.

The general rule in this subject is so well known that it needs no citation. A deficiency in maintaining a lookout will cast the burden in the offending vessel of proving that that fault did not contribute to the collision as in the case when positive statutory rules have been disobeyed.

"While I believe it to be clear that a proper lookout would have discovered the sloop in time to keep off, it is not necessary that this fact shall affirmatively appear except as a result of the inference stated; it is sufficient that the contrary is not proved."

*The George W. Childs*, 67 Fed. 271.

"As it is impossible for the tug to show that a lookout properly stationed, and without other duties, would not have enabled the tug to have avoided the collision, she must be held in fault."

*The Lyndhurst*, 92 Fed. 681.

"Unless it should appear to the court that the accident could not possibly have been avoided, even if the lookout was in his place and doing his duty, the Cheny should be regarded as contributing to the accident. Under such a rule it is considered that the Cheny was culpably negligent. If tugs will go about the harbor without lookouts, they may not expect that the court will conjecture nicely what would have happened if a lookout had been in his place, doing his duty when a collision occurred."

*The Arthur M. Palmer*, 115 Fed. 417.

Appellant did not meet this burden. It is true that a few tug captains testified that the pilot house was the best place for the lookout, and Inspector Turner was inclined to think so, but he says he never spent any time in a pilot house. (Ap. 177). But in any event this is a mere matter of opinion. Doubtless had we taken the time to do so we could have produced experienced men who would have given an exactly contrary opinion. The trial judge rightly disposed of these opinions in this language:

“The further contention that a person could see and hear better from the pilot house because of its elevated position than from the bow of the vessel, I think, is answered by the testimony in this case, which shows that the fog was general. If the testimony should disclose that the fog bank lay near the water and that the pilot house extended above the fog, the contention might have some force.” (Ap. 195).

The proctors for the appellant seem to think that the only reason for the lookout being required to be in the bow of the vessel is that he may see and hear better. But, as the cases show, an equally important reason is that he may be alone where there are neither companions or machinery or gear to distract his attention or prevent him from giving all his attention to the one duty of serving as eyes and ears to the ship.

There is a mass of evidence that the *Rosalie* was blowing her fog signals regularly. Not one was heard by the *Tillicum*. Her first intimation of the *Rosalie*'s presence was a returning echo from

her own whistle. She first saw her about two hundred feet away. It was undisputed that the engines of both vessels were reversed when the collision occurred. The impact was slight (Mate Anderson, Ap. 97). The vessels just touched and separated as all the witnesses agree.

How can anyone say that a proper and attentive lookout on the Tillicum would not have heard the Rosalie's signals? How can anyone say that a lookout properly stationed in the bow of the scow, as many of the cited cases hold he should have been, or even on the bow of the tug, as they universally hold, would not have discovered the Rosalie in time to avoid the slight collision which occurred?

And who can doubt but that if the Tillicum had reversed when she became cognizant that a steamer was so close ahead of her in the fog that her own whistles were rebounding from her, that this collision would not have occurred? It would doubtless have been prevented had she blown danger signals, or indeed any other signals instead of remaining silent for a minute.

## DAMAGES.

### 1. *Repair Bill.*

As appears from the testimony of Joshua Green, president of the libellant company, the stem of the "Rosalie" was stove in; and Captain James Fowler, Lloyds Agent, representing the Under-



writers, and Frank Walker, representing the owner, were called in to make a survey (Ap. 71). They agreed that certain repairs were necessary to replace the vessel in the same condition she was before the collision. (Ap. 71-74). Their report appears in the record as claimant's exhibit 7. (Ap. 183) The vessel was promptly sent to the Heffernan Dry Dock Company. This company did the work and rendered a bill in the sum of \$3385.32, which was paid on July 25, 1911, by the libellant, after having received the approval of the surveyors. (Ap. 73, 79, 161). The bill and receipt appear in the record as libellant's Exhibit "B". (Ap. 185).

After the above evidence had been produced, the cross-libellant called one Sandstrom, a ship carpenter, an employee of the cross-libellant, but who had not seen the "Rosalie's" injuries, or the repairs made (Ap. 129), who testified that \$850.00 would have been a fair price for the work called for by the survey, and made certain detailed criticisms of the bill, item by item.

Cross-libellant also called one Andrew McKay who had also done work for the cross-libellant, and who also had not seen the "Rosalie" after the accident, who testified substantially as Sandstrom had done. (Ap. 137). John L. Hubbard, manager of Hall Brothers Ship Yard, who likewise did not see the "Rosalie" after the collision, testified that the work could have been done for \$1050.00 as a maximum (Ap. 144), and also made certain detailed criticisms of the bill.

In rebuttal we called David Hollywood, who was the foreman for the Heffernan Dry Dock Company at the time the vessel was repaired, who explained the bill item by item. (See testimony Ap. 149-160). We also called Frank Walker, who testified among other things that the bill was approved by himself, representing the libellant, and by James Fowler, representing the Insurance Company as being for "work necessitated by the collision;" and as "reasonable for the work done." (Ap. 160-166). His evidence also shows that the insurance was adjusted on the basis of the bill in evidence and explains many other matters.

It is undisputed that we paid out \$3385.32 for repairs necessitated by the collision on a bill approved by the surveyors, one of whom was acting for the underwriters; and that the insurance was adjusted on that basis. The criticism of the bill came from witnesses interested in part, in part business rivals of the Heffernan Dock Company, but what is still more significant from men who did not see the injuries to the "Rosalie" or the repairs that were made. Furthermore their criticisms are explained by Hollywood and Walker. We have no doubt that the Court reading the evidence on this point (Ap. 149-166) must conclude that the sum of \$3385.32 was a necessary disbursement on our part for repairs caused by the collision.

## 2. *Ship's Crew.*

Frank Walker did not testify that the new propeller was installed by the crew of the "Rosalie" but surmised that they might have since there was no mention of this work in the bill. (Ap. 165). He might have with equal reason surmised that the bill for that work being for matters not caused by the collision was separately rendered and separately paid. The item complained of is shown in detail in the apostles on page 185 and was justly included in the award.

## 3. *Damurrage.*

The only complaint here is that the claimant took advantage of the opportunity of the vessel's being laid up to install a new wheel which change would not otherwise have been made until her regular overhauling time. (Ap. 164). It was not in any way charged in the bill nor is there a single line of testimony to show that this operation extended the demurrage time. The criticisms on the award especially on the last two items are too captious to require further answer.

In conclusion we respectfully pray that the decree of the lower court be in all respects affirmed.

Respectfully submitted,

IRA BRONSON,

J. S. ROBINSON,

H. B. JONES,

Proctors for Appellee.



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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**STIMSON MILL COMPANY**, a corporation, Claimant of the  
Tow Boat "Tillicum," her engines, boilers, tackle, apparel  
and furniture,

Appellant,

vs.

**THE INLAND NAVIGATION COMPANY**, a corporation,  
Claimant of the Steamer "Rosalie," her tackle, apparel  
and furniture,

Appellee.

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Upon Appeal from the United States District Court  
for the Western District of Washington,  
Northern Division.

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**PETITION FOR MODIFICATION OF DECREE  
AND FOR REHEARING**

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**HUGHES, McMICKEN, DOVELL & RAMSEY,**  
Proctors for Appellant.

660-671 Colman Building  
Seattle, Washington





No. 2616

IN THE

**United States Circuit Court of Appeals**

**FOR THE NINTH CIRCUIT**

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**STIMSON MILL COMPANY**, a corporation, Claimant of the  
Tow Boat "Tillicum," her engines, boilers, tackle, apparel  
and furniture,

**Appellant,**

**vs.**

**THE INLAND NAVIGATION COMPANY**, a corporation,  
Claimant of the Steamer "Rosalie," her tackle, apparel  
and furniture,

**Appellee.**

---

**Upon Appeal from the United States District Court  
for the Western District of Washington,  
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---

**PETITION FOR MODIFICATION OF DECREE  
AND FOR REHEARING**

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Comes now appellant and petitions Your Honors as  
follows:

I

That in any event the judgment and decree of the  
District Court be modified and that the amount of  
said judgment be reduced in the sum of \$597.30 with

interest. This Court will doubtless recall that upon the oral argument proctors for appellant called the Court's attention to an error in the decree occurring by reason of the fact that the Court had allowed the libelant to recover not only one-half of its entire damages, but also the damages to appellant's tug and tow. This proctor for appellee frankly admitted in his answering argument, and consented to the correction of the error. It was explained at the time to the Court that the error occurred in this wise: The Court in its opinion in the case (Record, p. 197) had said:

“The damage to the ‘Rosalie’ is shown to be \$5116.12; to the ‘Tillicum’ and scow \$597.30, a total loss of \$5713.42, which should be equally divided. *A decree may be presented for libelant in the sum of \$2856.71.*”

Proctor for appellee excused the mistake by saying that in the preparation of the decree he had followed the language of the Court in its opinion without noticing the error. It was also explained to the Court that at the time of the preparation of the briefs counsel overlooked, and hence did not expressly point out, this particular error.

We assume that this Court in the interval of time elapsing after the argument before the preparation of the opinion must have likewise overlooked the above facts; for surely the Court would not intentionally affirm a judgment, without modification, which allowed one of two parties, mutually at fault, to recover not only half of its own damages, but also

the whole of its adversary's; and particularly where the proctor of the party frankly admitted the error and asked correction thereof.

## II.

We shall not burden this Court with a request to reconsider the main question discussed in the briefs and oral argument, namely, whether the fault of the "Rosalie" was so great as to fully account for the collision. While feeling that this contention was well taken, we are bound to assume that it was rejected only after careful consideration by the Court. But permit us to suggest that too much consideration may have been given to the finding of the trial Court as to the amount of the damages of the "Rosalie". The fact that careful consideration was not given thereto is illustrated by the admitted error above pointed out.

It is a significant fact that little, if any, competent proof of this claim for damages was offered on behalf of the "Rosalie" in the first instance, its principal testimony being reserved for rebuttal. The testimony of three experienced shipbuilders, offered by appellant, not only pointed out that the bill for the repair of the "Rosalie" was excessive in many particulars, but that as to labor, for example, it would have been practically impossible to employ so many men upon the ship in performing the work. Two of them testified that the work required by the survey could have been done for one-fourth of the bill charged, and allowed in full by the trial Court; and

Mr. Hubbard, for many years the manager of Hall Brothers' shipyard, the oldest and most reliable on Puget Sound, testified that the work could have been done for considerably less than one-third of the bill. There could be no justification for recovery of more than the necessary cost of the repairs required by Lloyd's survey. This discrepancy is so great as to excite surprise, if not grave distrust, and we feel that if this Court will carefully examine this portion of the testimony it will further modify its judgment by reducing the amount of the damages allowed to the "Rosalie."

Respectfully submitted,

HUGHES, McMICKEN, DOVELL & RAMSEY,  
Proctors for Appellant.















